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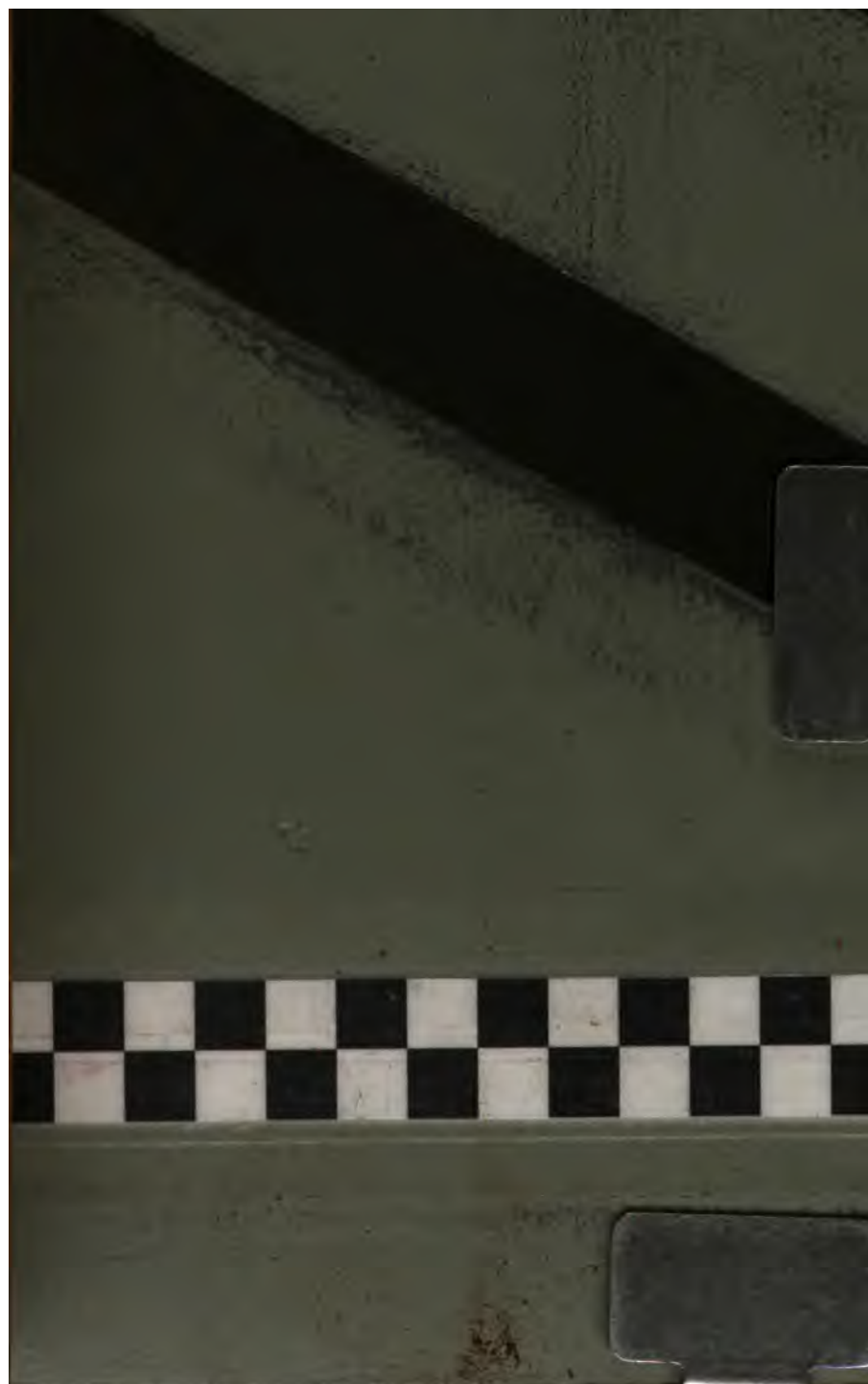
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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

DURING

MICHAELMAS TERM, EIGHTH GEO. IV.

AND

HILARY TERM, EIGHTH AND NINTH GEO. IV.

BY

JAMES MANNING, Esq. of LINCOLN'S INN,

AND

ARCHER RYLAND, Esq. of GRAY'S INN,

BARRISTERS AT LAW.

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CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN
MICHAELMAS TERM,
IN THE EIGHTH YEAR OF THE REIGN OF GEORGE IV.

MEMORANDA.

DURING the vacation, Sir *Anthony Hart*, Knight, Vice-Chancellor, was promoted to the office of Chancellor of Ireland, vacant by the resignation of the Right Honorable Lord *Manners*; and was succeeded by *Launcelot Shadwell*, of the Honorable Society of Lincoln's Inn, Esq.

On the first day of this term, *Charles Frederick Williams*, Esq., *William Selwyn*, Esq., and the Honorable *Thomas Erskine*, all of Lincoln's Inn, having been, in the course of the vacation, appointed his Majesty's Counsel Learned in the Law, were called within the Bar, and took their rank accordingly.

BREWER and GREGORY, Assignees of PITTER, a Bankrupt, v. SPARROW. *J. B. 310*

Assignees cannot at first affirm the act of a creditor interfering with the bankrupt's effects, as a contract, and afterwards disaffirm it as a tort; although such act, if disaffirmed by them in the first instance, would have amounted to a conversion of the bankrupt's goods, and have rendered the creditor liable to the assignees in an action of trover.

TROVER, by the plaintiffs, as assignees of one *Pitter*, a bankrupt, for certain goods of the bankrupt, alleged to have been wrongfully seized by the defendant. At the trial, before *Abbott*, C. J., at the London adjourned sittings after last *Hilary* term, the cause was referred to a barrister, with power to him, if he should find that the defendant acted in all things *bonâ fide*, and solely for the benefit of the creditors, to find *that* upon his award, in order to submit the question of law to the consideration of the Court. The arbitrator afterwards made his award, in which he stated the following facts:—

The commission of bankrupt issued against *Pitter*, on the 21st October, 1825, upon the petition of the plaintiff *Brewer*. The act of bankruptcy upon which the commission was founded, was committed on the 2d October, 1825. The assignment to the plaintiffs, under the commission, was executed on the 3d December, 1825. The goods for which the action was brought, consisted of the stock in trade, household furniture, and effects, found upon the premises of the bankrupt at Cheltenham, in Gloucestershire, where he had carried on business, until the 2d October, 1825, on which day he absconded, and left his dwelling-house and shop. In consequence of the bankrupt having so absconded, a meeting was held on the evening of the 4th October, 1825, at the defendant's house in London, between the plaintiff *Brewer* (the petitioning creditor), the bankrupt's father, and the defendant, who was a creditor of the bankrupt; when, after some discussion as to what was best to be done for the benefit of the creditors, it was agreed that the defendant should go down immediately to Cheltenham. Accordingly, the defendant left London the same evening, and arrived at Cheltenham on the following morning, when he found the house and shop of the

bankrupt shut up, and upon his arrival he took possession thereof, and also of the stock in trade, household furniture and effects, and re-opened the shop, and continued the business, assisted by his son and the apprentice of the bankrupt, by selling the stock, in the same manner as had been done by the bankrupt. While the defendant continued in possession, and was conducting the business, but before the issuing of the commission, the plaintiff *Brewer* arrived at Cheltenham, and went upon the premises, and there saw the defendant and his son, and the apprentice, carrying on the business, and selling the stock of the bankrupt; and at the same time looked over the house and shop, and took an inventory of the household furniture, and went into the cellar with the defendant, and there examined the stock of wine left by the bankrupt; and afterwards returned to London, leaving the defendant in possession, conducting and carrying on the business, which he continued to do until the 13th November following, when he and his son quitted the premises, leaving the apprentice in possession. On the 15th November, a messenger, by virtue of a warrant issued by the commissioners under the commission, at the instance of the plaintiff *Brewer*, arrived at Cheltenham, and took possession of the premises, the household furniture and effects, and the stock in trade, which consisted partly of stock which had belonged to the bankrupt, and partly of stock which the defendant had purchased during the time he continued the business, and which had been mixed up and in part sold with the bankrupt's stock, for the general benefit of the trade of the shop, and to enable the defendant to sell the bankrupt's stock more beneficially than he otherwise could have done. From the 15th November, the business of the shop was continued and carried on under the direction of the plaintiff *Brewer*, with the same stock so taken possession of by the messenger; until on or about the 24th January, 1826, when the plaintiff *Brewer* caused the stock in trade then remaining undisposed of to be sold by public auction; together with all

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the household furniture, and other effects of the bankrupt mentioned in the declaration, and in the particulars of the plaintiffs' demand, and received the produce of such sale. The goods so purchased by the defendant amounted to 212*l.* and upwards, which he paid for out of the monies received by him in the sale of the general stock in trade. He conducted the business fairly, and with the same care and attention as if it had been his own individual concern. He kept a daily account of the sale and purchase of the stock bought and sold, of all monies received and paid, and of all incidental expenses during the time he continued in possession; and such account was a just and true account: and at the time of his quitting possession, he left with the apprentice of the bankrupt, who remained on the premises until the sale by auction, the balance of such account, amounting to 20*l.* 6*s.* 3*d.*, which sum the apprentice duly paid to the messenger, who duly paid and accounted for the same to the plaintiff, before the commencement of the action. On the 21st January, the defendant being summoned before the commissioners, delivered a copy of the account so kept by him to the plaintiffs. The action was commenced on the 4th April following. The defendant did not intermeddle with, or dispose of any part of the bankrupt's goods, chattels, or effects, except his stock in trade. The defendant acted in all things touching and concerning the taking possession, and selling, and disposing of the stock in trade of the bankrupt, and purchasing other stock, and conducting the business, and in all other matters relating to or concerning the subject matter of the action, *bonâ fide*, and solely for the benefit of all the creditors of the bankrupt.

The arbitrator then awarded, that if the Court should be of opinion that the action could not be maintained, a verdict should be entered for the defendant; but if otherwise, for the plaintiffs.

The question for the opinion of the Court was, whether, under the circumstances stated in the award, the action

was maintainable against the defendant for taking possession of the bankrupt's effects ; or, whether, the arbitrator having found that the defendant, after having taken such possession, acted in all respects for the benefit of the creditors, that could be considered a good defence to the action.

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Hutchinson, for the plaintiffs. This action is maintainable in point of law. The conduct of the defendant amounted to such an interference with the effects of the bankrupt, as gave his assignees a right of action. Such an interference was tortious, it was in effect a conversion of the goods. The defendant assumed the right of selling, and actually did sell, the bankrupt's effects as his own, without having received the slightest authority from the assignees so to do. The bankrupt absconded from Cheltenham, where he had carried on his business, on the 2nd of October. A meeting of his creditors was held in London on the 4th, and it was there agreed that the defendant should go down immediately to Cheltenham. But that was no sanction of the defendant's subsequent conduct, because the plaintiff *Brewer*, who was one of the creditors present at that meeting, was not then appointed assignee, and therefore had no power or authority to sanction any such proceeding. The plaintiff *Brewer* afterwards went to Cheltenham himself, and saw the defendant in possession ; but that also was before the commission issued, therefore that visit cannot be considered as any sanction of the defendant's proceedings : and, on the contrary, the plaintiff *Brewer* evidently meant to repudiate those proceedings ; for the very next step he took, was to return to London, and sue out the commission. But even if the plaintiff *Brewer* had intended to sanction all that the defendant did, still, as he was not then assignee, he had no authority to do so, and having now become assignee, he may maintain an action against the defendant for acts of his amounting to a conversion. That the defendant has been guilty of a conversion is quite clear, for he is

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guilty of a conversion who takes the property of one person by assignment from another, who has not any authority to dispose of it. That was decided in *M'Combie v. Davies (a)*, and upon that principle it seems necessarily to follow, that this action is maintainable.

Brodrick, contrà, was stopped by the Court.

BAYLEY, J.—I am of opinion that, both by law and justice, the defendant in this case is entitled to a verdict. That the justice of the case is on his side, no human being, I think, can doubt; and I am happy in being able to come to the conclusion, that the law of the case is with him also. It is perfectly clear that, from first to last, the plaintiff *Brewer* assented to all that the defendant did. I do not put the case upon the ground that he had a right to give his assent to what was done, because he was not then acting in the character of assignee. But there is no doubt that the assignees of a bankrupt have a right, if they chuse, to affirm the acts of a person interfering with the bankrupt's estate, even though his acts are such as would otherwise amount to a conversion of the effects; for though they have a right to treat him as a wrong-doer, they may, if they think fit, waive that right, and treat him as their agent. It is found here, by the award, that the defendant, in the disposition of the bankrupt's goods, acted for the benefit of all the creditors jointly, and not for his own individually. The assignees were at liberty to affirm, or to disaffirm, that disposition of the bankrupt's goods, as they chose; and which course have they adopted? They have most clearly affirmed the defendant's acts, and that in their character of assignees; for the defendant having mixed up goods and money of his own among those of the bankrupt, the balance of the account forming the remaining produce of the bankrupt's goods, was paid by the defendant to the messenger, and by the messenger to the plaintiff, after

(a) 6 East, 533. Et vide *Baldwin v. Cole*, 6 Mod. 221.

the assignment to him and his co-assignee, and was received by him, without any objection. I think that was a complete recognition by the assignees of all that the defendant had done, and having once affirmed and adopted his acts, they cannot now turn round, and by bringing this action, disaffirm and repudiate them. This is no new doctrine. *Smith v. Hodson* (a), and a variety of other cases, have decided, that the assignees of a bankrupt cannot affirm the same transaction in one part as a contract, and disaffirm it in another as a tort; and the present decision is perfectly in unison with that principle. For these reasons I am of opinion, that the defendant is entitled to judgment.

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HOLROYD, J.—I think there was a complete confirmation of all the defendant's acts by the plaintiff *Brewer*, in his character of assignee; and that being the case, it would be contrary both to law and justice to allow him to repudiate those acts now.

LITLEDAL, J.—I am entirely of the same opinion.

Judgment for the Defendant.

(a) 4 T. R. 211. Vide Mont. B. L. 473; Selw. N. P. 7th ed. 224, and the cases there collected.

The KING v. The INHABITANTS OF TROWBRIDGE.

7. Nov. 452.
TWO Justices, by their order, removed *Matthew Acorn*, *Elizabeth* his wife, and their two children, from the parish of Trowbridge, in the county of Wilts, to the parish of Chatham, in the county of Kent; and the

The fact of a poor child being first found in a particular parish, is no evidence of his having been born there; and his being maintained by that parish for several years, and afterwards occasionally relieved by them for several weeks together, does not amount either to an admission, or to conclusive evidence, of his being settled there.

Seemle, that relief given to a pauper is no evidence of his being settled in the relieving parish.

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sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case :—

The pauper's first recollections were of his being in the workhouse at Chatham. He supposed he might be then about four or five years old. He never knew his father, and his mother was not in the workhouse with him. He stayed in the workhouse till he was thirteen or fourteen, when he entered on board a man of war, and served in various ships till the year 1814. He then went to Trowbridge, and married there. Being out of work at Trowbridge, he went with his wife to the workhouse at Chatham, where he stayed more than three weeks, during which time he was maintained there by the parish of Chatham; and, on going away, was furnished by the parish officers of Chatham with 1*l.* in money, and a pair of shoes for him and his wife, to return to Trowbridge. He returned there, and remained there about ten years, when, being again out of work, he went to Chatham again, with his wife and family, where he again stayed about three weeks in the workhouse; and while there was again maintained by Chatham, and received 1*l.* in money, and a pair of shoes for him, his wife, and each of his children, and provisions to return to Trowbridge; at the same time he was desired by the Chatham overseers not to return to Chatham again, without an order or a pass. He then returned to Trowbridge, at which place he was afterwards relieved, and thereupon removed, by order of the magistrates, to Chatham. The parish registers of Chatham were searched by the pauper, but no entry was found of his baptism, nor of any persons bearing his name.

Bingham and *Awdry*, in support of the order of sessions. The sessions were right. There was no sufficient evidence of a settlement in Chatham. Relief is no evidence of settlement; at least, it is not conclusive evidence. It was held, in *Rex v. Chatham (a)*, that giving parish

(a) 8 East, 498.

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relief to a pauper within the parish, was no evidence of his settlement there; and in that instance the relief was administered at one time for a fortnight, and at another time for a longer period, in the parish workhouse. That is a direct authority to shew, that the relief given to this pauper by the parish officers of Chatham, is no evidence of his being settled there. Then there was no other evidence; for no registry of his baptism could be found at Chatham: and if he had been born in the workhouse of that parish, it is impossible to doubt that he would have been baptized there. The register of baptism is not indeed *alone*, sufficient evidence of the place of a person's birth, *Rex v. North Petherton (a)*, and yet, in that case, the pauper must have been on the spot, and have undergone an important ceremony there: but a person must be presumed to have been baptized somewhere; and the natural further presumption seems to be, that he was born in the parish in which he appears to have been baptized. Again, no entry was found at Chatham of any person bearing the pauper's name; a fact which furnishes a very strong presumption, that he was not of a Chatham family. Considering Chatham as a depôt of soldiers and sailors, who are continually fluctuating, arriving there from all parts of the world, with their wives and children, and, after a short stay, again departing, nothing can be more probable than that this pauper was the offspring of such parents, born and baptized in some distant, perhaps foreign, place, and brought there, and soon afterwards deserted there by those to whom he belonged. This is a mere question of presumption; and this short view of the case clearly shews, that all the presumptions that can arise from the facts, are against the idea of the pauper's being settled at Chatham. But, whatever view the Court may take of the case, they cannot overturn the decision of the sessions. The question before them was one of fact, which it was peculiarly within their province to decide;

(a) 8 D. & R. 325. 5 B. & C. 508.

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they have decided it, and this Court cannot interfere.
Rex v. Chatham (a).

Merewether, Serjt., contrà. The authority of the case of *Rex v. Chatham*, and the propriety of the doctrine there laid down, respecting the effect of relief as evidence of a settlement, cannot be impugned; but the present case is very distinguishable from that, and therefore cannot be governed by it. The facts here found, that the pauper's first recollections were of being in Chatham workhouse, when he was four or five years old, and that he remained there, supported by the parish, until he was thirteen or fourteen years old, are decisive to shew that his settlement is in that parish. The old rule of law is, that where the place of birth, and of the parents' settlement, are unknown, the first known place of abode of the child, is the place of settlement, *Dalton*, c. 23; and it was laid down distinctly, by Lord Holt, in *Banbury v. Broughton (b)*, that the parish in which a child is first found must provide for it, until they can find a prior settlement for it elsewhere. Now, the present case falls completely within these rules; for Chatham, being the first known place of the pauper's abode, and that parish having maintained him for a long course of years, the only reasonable presumption to be drawn is, that he was born there; and the consequence will be, that he is settled there. The principle upon which it has been held, that relief is no evidence of a settlement in the relieving parish, seems to be, that it may have been administered to the individual as casual poor, which is an act of duty and necessity. Thus, where a case from the sessions only stated the bare fact of a pauper's having received relief from the respondent parish, it was held that this was not even *primâ facie* evidence of a settlement there, since he might have been so relieved as casual poor, which the overseers were bound to do, if wanted, whether the pauper were settled there or not. *Rex v. Chatterton (c).*

(a) 8 East, 498.

(b) Comb. 364.

(c) 2 East, 27.

The doctrine, then, cannot apply to cases where there are facts to shew that the relief was not given to the pauper as casual poor, or as an act of necessity, which there are here ; and much less can it apply where the relief is continued even while the pauper is in another parish, which it may fairly be said to have been here ; for the repeatedly supplying the pauper with money, clothes, and provisions, for his journey from Chatham to Trowbridge, was in effect relieving him in Trowbridge ; and, coupled with the repeatedly receiving and relieving him at Chatham, upon his coming thither from Trowbridge, amounted to a complete admission that he belonged to Chatham, and was settled there. With respect to the argument that this Court have no jurisdiction in this case, it is wholly unfounded ; for the sessions have not dealt with this as a mere question of fact ; they have decided, erroneously, as is now submitted, that a particular legal authority was applicable to this case, and it is perfectly competent for this Court to review that decision.

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BAYLEY, J.—If the decision in the case of *Rex v. Chatham* (a) is law, which seems not to be denied, relief is no evidence of a settlement in the relieving parish ; and then the sessions could not act upon the evidence of the relief by Chatham, and have come to the right conclusion, in holding that there was no proof of the pauper's being settled at Chatham. It does not, however, appear to me in the present case necessary to say, that relief is no evidence of a settlement ; because, admitting that there was some evidence of a settlement at Chatham, the effect of that evidence was a question for the sessions to decide : and as they have decided it, and the facts of the case do not, in my opinion, shew that their decision was wrong, I think we ought not to interfere to disturb it. The pauper is first found in the workhouse, at Chatham. By what means he came there, does not appear. Until they could

(a) 8 East, 498.

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ascertain that he had a settlement elsewhere, the parish officers of Chatham were bound to maintain him. In a case like this, the discovering another place of settlement was an extremely difficult thing, and the fact of Chatham relieving the pauper in the interval, was no evidence, or at least not conclusive evidence, of his being settled there. In process of time the pauper became settled at Trowbridge, and received relief from that parish. He afterwards revisited Chatham; but how did the officers of Chatham then act? They relieved him, undoubtedly, and supplied him with money, provisions, and clothes; but for what purpose? For the purpose of returning him to Trowbridge, and at the same time telling him not to come to Chatham again, without an order or a pass. I think it is impossible to say that relief given by Chatham, under such circumstances, and for such a purpose, was relief given to the pauper in Trowbridge, or was any admission that he was settled and belonged to Chatham; if it had been, it would have been conclusive against the latter parish; but as it seems to me, it had no such effect. I cannot concur in the argument that the mere fact of a pauper being first found in a particular parish, is presumptive evidence of his having been born there; and if the cases that have been referred to, go that length, I, for one, must be allowed to doubt their authority. Upon the whole view of this case I am of opinion, that the sessions have come to a right conclusion, and, therefore, that their order ought to be confirmed.

HOLROYD, J., and LITTLEDALE, J., concurred.

Order of Sessions confirmed.



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The KING v. The INHABITANTS of GREAT BOWDEN.

7 B. & C. 249
TWO Justices, by their order, removed *John Harding*, *Mary* his wife, and their two children, from the hamlet of Sutton, in the parish of Castor, in the liberty of Peterborough, in the county of Northampton, to the parish of Great Bowden, in the county of Leicester: and the sessions, on appeal, confirmed the order, subject to the opinion of this Court upon the following case:—

The pauper, *John Harding*, came to Mr. *Hamshaw*, an innkeeper, residing in the parish of Great Bowden, and asked for a place. Mr. *Hamshaw* had no objection, and put him on as ostler, but said that he did not mean him to have a settlement, as the parish was very particular. No earnest or wages were given, but the pauper was to have what he got as ostler. He had his lodging and his board in his master's house. The pauper could have left at any time he pleased, or the master might have turned him away at any time. The pauper lived with Mr. *Hamshaw* as ostler, under the above terms, about a year and a half. The sessions were of opinion that this was a general hiring, followed by service of above a year, and that the master's remarks at the time of hiring could not prevent the pauper from gaining a settlement thereby.

Thesiger, in support of the order of sessions. The sessions were right. This was a general hiring, followed by a year's service, and conferred a settlement. This will be denied by the other side on two grounds; first, because the master at the time of the hiring said that he did not mean the servant to have a settlement; and second, because the case finds that the servant could have left at any time he pleased, and that the master might have turned him away at any time. There is no weight in either of those objections. First, the mere expression by the master, at the time of the hiring, of an intention to prevent the servant

The pauper asked an innkeeper for a place, who replied he had no objection, and put him on as ostler, saying, that he did not mean him to have a settlement. No earnest or wages were given, but the pauper was to have what he got as ostler. The pauper lodged and boarded in the master's house. The pauper could have left at any time he pleased; or the master might have turned him away at any time. The pauper lived with the innkeeper as ostler, under the above terms, more than a year:—Held, that this was not a general, or yearly hiring, and that no settlement was gained by service under it.

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from obtaining a settlement, will not rebut the presumption of a general hiring, if there are other circumstances in the case from which that presumption may fairly be drawn. It must be admitted, that a *bonâ fide* hiring for a shorter time than a year, though for the express purpose of preventing the servant from gaining a settlement, is lawful, and will operate accordingly; but that is only where it is clear from the terms of the contract, that a yearly or general hiring was not intended. In *Rex v. Mursley (a)*, where the master at the time of hiring, told the servant that he should not gain a settlement in the parish, and hired him three days after *Michaelmas*, to serve until the *Michaelmas* following, the hiring was held not to be within the statute, although the sessions found that such transactions were fraudulent on the master's part; "for," as *Buller, J.*, there observed, "the question of fraud only arises, where in truth there is a hiring for a year, but the parties endeavour to colour it, in order to prevent the pauper's gaining a settlement." Now, the question of fraud arises here, for there is in truth a hiring for a year, that is, there is an indefinite or general hiring, which the law makes a hiring for a year; therefore, this case comes within the exception mentioned by *Buller, J.*, in *Rex v. Mursley*, and also within the decision in *Rex v. Milwich (b)*, where it was held, that if an agreement be merely colourable, for the purpose of avoiding a settlement, but be in substance a hiring for a year, a settlement will be gained by it. All the facts of this case shew that a hiring for a year was contemplated, and none more strongly than the master's declaration, that he did not mean the pauper to have a settlement; because, if he knew that the hiring was for less than a year, it was perfectly unnecessary to say any thing about a settlement, inasmuch as a settlement under such a hiring could not by possibility be acquired. Second, the statements in the case, that the servant could have left at any time, and that the master could have discharged him at any time, do not affect the

(a) 1 T. R. 694. 2 Bott. 246. (b) Burr. S. C. 433. 2 Bott. 210.

settlement, because they are mere findings of matters of fact by the sessions, and formed no part of the contract made between the parties. If they had been parcel of the terms of the contract, the case of *Rex v. Christ's, York (a)*, would have been decisive of this case; because it was there held, that where a pauper went to service "for meat and clothes, as long as he had a mind to stop," and stopped two years, there was no hiring for a year, and no settlement gained. But there it was part of the contract, that the pauper might quit when he pleased; here, that was no part of the contract. The fact is merely found, as a fact, by the sessions, and as such it does not affect the question; because, under every general hiring, it is in the power of either party to terminate the connexion whenever he pleases. Upon this point, *Rex v. Stockbridge (b)*, is an express authority. There, a boy went into an inn yard, and asked the master whether he wanted a boot-catcher and driver, and being answered yes, replied, he should be glad to serve him, and was ordered to take care of the horses, and not to drive them too hard, and no mention was made of meat, drink, washing, and lodging, but he was found in them, and received no wages. That was adjudged a hiring for a year; and the opinion of the master and servant as to their being entitled to separate at pleasure, or bound to continue during the year, was held to make no difference in the case.

Nolan, contrà, was stopped by the Court.

BAYLEY, J.—I am of opinion that it was part of the contract between the parties in this case, that each should be at liberty to terminate the connexion whenever he thought proper. The sessions have stated that fact to us, and have stated it, in my opinion, not as a finding of their own merely, but as the law existing in the case; which

(a) 5 D. & R. 314. 3 B. & C. (b) Burr. S. C. 759. 2 Bott. 348. 459.

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could only arise out of the contract. I do not consider that, under a general hiring, the parties are at liberty to separate when they please; on the contrary, I think the one is bound to serve, and the other bound to employ, for a year: and that, if that is not the understanding, the hiring is not general, but is a hiring for a less period than a year. A general hiring is, in contemplation of law, a hiring for a year; but this is not a general hiring. This is like the case of *Rex v. Trowbridge*, decided in *Easter term*, 1816, but not reported; where this Court held that a hiring "for as long time as the pauper pleased," was a hiring at will, and rebutted the presumption of a hiring for a year^(a). This was a hiring "for as long time as the pauper pleased," for the sessions inform us that it was part of the contract, that the pauper might leave whenever he pleased, and that the master might discharge him whenever he pleased. That being the case, there was no hiring, either expressly or by implication, for a year, but there was a hiring for a less period than a year, and service under such a hiring confers no settlement. It seems to me, therefore, clearly, that the sessions have come to a wrong conclusion in this case, and that their order must be quashed.

HOLROYD, J., and LITLEDALE, J., concurred.

Order of Sessions quashed.

(a) Cited by *Bayley, J.*, in *Rex v. Christs', York*, 5 D. & R. 314. 3 B. & C. 459.

The KING v. the INHABITANTS of YNYSYNHAIARN.

The interest
 of a tenant
 from year to
 year, or of the
 executrix of
 such tenant,
 of an estate
 under 10l. a year,
 passes to her husband
 on their marriage by
 operation of law, and he
 acquires a settlement by
 40 days' residence upon
 the estate.

J.C. 7 D.C. 233.
 TWO justices, by their order, removed *Hugh Hughes, Mary* his wife, and their five children, from the parish of Aberdaron, to the parish of Ynyscynhaiarn, both in the county of Carnarvon. On appeal, the sessions confirmed

under 10l. a year, passes to her husband on their marriage by operation of law, and he acquires a settlement by 40 days' residence upon the estate.

the order, subject to the opinion of this Court upon the following case :—

Hugh Prichard, the pauper's father, was born in the appellant parish of Ynyscynhaiarn. The pauper gained no settlement in his own right. One *Hugh Williams*, the father of one *Elizabeth Hughes*, hereinafter-named, resided as tenant of a small farm, called Peny Cwin, in the parish of Aberdaron, and which he held at the rent of 3*l.* 5*s.* per annum, and died thereon, the 9th of June, 1782. Previous to the said *Hugh Williams*' death, he made a will, dated the 23rd of May, 1782, bequeathing all his personal estate and effects, subject to the payment of small legacies, to his daughter the said *Elizabeth Hughes*, before named, and appointed her sole executrix thereof. *Elizabeth Hughes* continued to reside at Peny Cwin, from the time of her father's death until the time of her marriage, as after mentioned. *Hugh Prichard*, the pauper's father, never saw *Hugh Williams*. The first time *Hugh Prichard* saw the said *Elizabeth Hughes* was, when on her return after taking her land. On the 27th of July, 1782, *Hugh Prichard* married *Elizabeth Hughes*, and thereupon went to reside with her at Peny Cwin, where they continued many years. *Elizabeth*, the wife of *Hugh Prichard*, proved her said father's will on the 23rd of May, 1783. *Hugh Williams* never paid any taxes in Aberdaron, nor did *Elizabeth Hughes* while sole, nor the said *Hugh Prichard* after his marriage (except county bridge rate), until after the year 1795; and *Hugh Prichard* never paid more rent for Peny Cwin, than 7*l.* 18*s.*

Russell, Serjeant, in support of the order of sessions. The case finds that the pauper's wife "took the land" between the period of her father's death and that of her marriage. At that time some estate in the land had already vested in her as executrix, therefore that was a re-taking, the effect of which was that she then surrendered the estate which she had previously taken under the will,

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and became merely tenant from year to year, of premises not worth 10*l.* a-year. If so, her interest in the land did not vest in her husband by their marriage, so as to confer a settlement upon him by residence for 40 days upon it. It has, indeed, been held, that where a woman, before marriage, purchased a leasehold estate for 6*l.*, the estate, on her marriage, vested by operation of law in her husband, who gained a settlement by a 40 days' residence; *Rex v. Ilmington (a)*; but there the estate purchased was a lease for years: and there is no case which has decided, that a mere tenancy from year to year will have the same operation. Besides, it is quite equivocal and uncertain upon the face of this case, what interest, if any, the father of the pauper's wife had in the land, or could bequeath at his death; and before the Court can say that such an interest passed to the daughter as vested in her husband on their marriage, they must at least know what interest there was in the father, from whom the daughter took.

R. V. Richards, contra. The case finds that the father resided on a farm as tenant, and held it at the rent of 3*l.* 5*s.*; that he bequeathed all his estate and effects to his daughter; and that she continued to reside on the farm, from the time of his death until her marriage. The taking of the land, afterwards mentioned, clearly means the taking as executrix under the will. It must, therefore, be presumed, that the father had such an interest in the farm as he could devise, and the daughter could take, as an estate for years; and if so, that clearly vested in the husband by operation of law by the marriage, and a 40 days' residence on the farm, though its value was under 10*l.* a-year, gave him a settlement. But, even if the daughter re-took the land, and was interested in it, not as executrix, but in some other mode, her interest, be it what it might, vested in her husband as her assignee by operation of law. If that interest was an estate for years, it is

(a) Burr. S. C. 566. 2 Bott. 471.

admitted, upon the authority of *Rex v. Ilmington* (a), that it conferred a settlement on her husband; and *Rex v. Netherseal* (b), and *Rex v. Stone* (c), are authorities to shew, that if her interest was only a tenancy from year to year, the result would be the same.

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BAYLEY, J.—I think it must be inferred, from the facts of this case, considering them altogether, that the pauper's wife took the land, under her father's will, as tenant from year to year. If so, her interest in the land passed to the pauper upon their marriage, by operation of law, and a 40 days' residence upon it conferred a settlement on him. *Rex v. Stone*, is an authority expressly in point in this view of the case, because it was there held that the executor of a tenant from year to year, of an estate under 10*l.* a-year, might gain a settlement by residing on it 40 days, though he had not proved the will at the time; and the husband of an executrix, becoming by operation of law the assignee of her interest, must stand in precisely the same situation as the executrix herself. Then, whether the pauper's wife took as executrix, or took anew in her own right as tenant, is perfectly immaterial, because her interest equally passed to her husband by operation of law. This point was considered in *Rex v. Houghton le Spring* (d), where a distinction was taken between the cases where a party came to his property by his own act, or by operation of law. It was there said to be the established rule, that though a person cannot acquire a settlement by a *purchase* for less than 30*l.* paid, yet if he take such estate by devise, he may. So, though he cannot gain a settlement by renting a tenement of less value than 10*l.* a-year, yet, if such estate devolve upon him by operation of law, he may acquire a settlement by 40 days' residence upon it; and it signifies not, whether he be a tenant from year to year, or a tenant for a term of years, the distinction being one

(a) Burr. S. C. 566 2 Bott. 471.

(c) 6 T. R. 295.

(b) 4 T. R. 258.

(d) 1 East, 250.

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of words rather than of substance (a). I am, therefore, of opinion, that the pauper acquired a settlement in Aberdaron, by 40 days' residence upon the farm in that parish, whether his wife was interested in it as executrix, or as a new tenant, and whether for a term of years or as yearly tenant only; and therefore, that the order of sessions must be quashed.

HOLROYD, J., and LITLEDAL, J., concurred.

Order of Sessions quashed (b).

(a) Doe dem. *Westmoreland v. Smith*, post.

(b) Vide Lewin's Settlement Law, 404, et seq., and the cases there collected.

The KING v. The INHABITANTS of KINGSWINFORD.

Where a canal passes through several parishes, and the tonnage dues earned in each vary in amount, the proprietors of the canal must be rated to the poor of each parish in proportion to the amount of tonnage dues actually earned there, and not according to the proportion of the whole amount earned along the whole line of the canal.

L.C. 7. B. 226
BY a rate made for the relief of the poor of the parish of Kingswinford, in the county of Stafford; the Company of Proprietors of the Dudley Canal Navigation, were assessed as follows:—

Dudley Canal Company,	} Annual value,	Rate,
for canal, reservoirs, bath, tonnage dues, &c.		604 <i>l.</i> 2 <i>s.</i> 2 <i>d.</i>

The sessions, on appeal, reduced the rate to 9*l.* 16*s.* 11*d.*, subject to the opinion of this Court, upon a similar case to that stated in *Rex. v. The Dudley Canal Company* (c), with the following additions:—

The said Company of Proprietors, are empowered to take different rates of tonnage upon those parts of the said canal, which are made under each of the said recited acts of the 16th, 25th, and 33rd Geo. 3. The land occupied by the said Company of Proprietors, in the said parish of Kingswinford, for the purposes of the said canal, is

(c) 7 D. & R. 466.

12*a.* 2*r.* 36*p.*; the whole of which was taken under the said recited act of 16 *Geo.* 3, and is one twelfth part of the land occupied by the said Company of Proprietors, for the purposes of the whole of the Dudley Canal, made under the said recited acts of 16*th*, 25*th*, and 33*rd Geo.* 3; and extending through the several parishes of Kingswinford, Dudley, Tipton, Sedgley, Rowley Regis, Hales Owen, and Northfield. The account of the tonnages arising upon the whole of the canal, made under the said recited acts, and of the expenses and outgoings thereon, is kept as one joint concern, and not separately, and the profits of the whole are divided among the proprietors, generally, according to their shares therein. The total amount of tonnage received by the said Company of Proprietors for the last year, on the whole of the said canal, after deducting the expenses, is 5670*l.* 13*s.* 1*d.*; one twelfth part of which is 472*l.* 11*s.* 1*d.*, a rate on one half of which sum, (236*l.* 5*s.* 6*d.*), at 10*d.* in the pound, is 9*l.* 16*s.* 11*d.*: to which the sessions have reduced the rate. The tonnage received during the same period for goods, &c., carried on that part of the said canal, made under the said recited act of 16 *Geo.* 3, which is situate in the parish of Kingswinford, after deducting expenses, is 1208*l.* 4*s.* 4*d.*, and a rate made on the half of that sum (604*l.* 2*s.* 2*d.*), at 10*d.* in the pound, is 25*l.* 3*s.* 4*d.*; at which sum, the said Company of Proprietors are rated.

The question for the opinion of the Court is, whether the different parts or extensions of the said canal, made under the several hereinbefore recited Acts of Parliament, ought to be taken as one joint concern, as far as relates to the poor rates, or whether that part thereof made under 16 *Geo.* 3, ought to be rated as a distinct and separate concern. If the Court should be of opinion that the different parts or extensions of the said canal, made under the acts of 16*th*, 25*th*, and 33*rd Geo.* 3, form one joint concern for the purpose of rating, the order of sessions to be confirmed. But if they should be of opinion that such

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part of the said canal, as was made under the act 16 Geo. 3, ought to be rated to the parishes through which it passes, as a separate concern, then the order of sessions to be reversed, and the amount of the rate to be altered to 26*l.* 3*s.* 4*d.*

Russell, Serjt., and *Whateley*, in support of the order of sessions. The Dudley Canal Company are the proprietors of three lines of canal, each made under a separate act of parliament; but the three were afterwards incorporated into one, and now form one joint concern: for the receipts and expenses in respect of each are kept in one account, and the profits arising from them all are divided, generally, among the proprietors. The canal passes through several parishes, to all of which the proprietors admit that they are rateable; but they contend that the canal should be rated to all the parishes as one joint concern, for a proportion of the whole profits, and not to each separately, for the amount of the profits earned in each separate parish. The latter mode has been adopted in the parish of Kingswinford, and if that principle is to be acted upon generally, infinite confusion and difficulty will be the consequence. The tolls which are collected for goods which pass through this particular parish, are payable as a compensation for the use of the whole line of the canal, and not merely of that part which lies in that parish. The proprietors of the canal are rateable only as the occupiers of the canal, or of land covered with water, for their tolls, as profits arising out of the land so occupied. They are rateable, therefore, in every parish through which the canal passes, in respect of the land there situate and so used for the canal. The true principle of rateability is this:—the land is to be rated to the relief of the poor in the parish where it is productive of profit to the proprietor, and in proportion to that profit; which may be considered in the nature of a rent, received by the proprietor for the use of his land within the parish. The

proprietor of a navigation, is to contribute in respect of the profits of the land extending probably through many parishes, and he is to pay to each of those parishes in respect of the land locally situate within it. These are principles which have been laid down in all the recent cases upon this subject: *Rex v. Milton (a)*, *Rex v. The Trent and Mersey Canal Company (b)*, *Rex v. Palmer (c)*, *Rex v. The Oxford Canal Company (d)*. Here the whole land occupied by the canal contributes to produce the entire amount of the tolls, and the proprietors ought not to be assessed at that amount in any one of the parishes through which the canal passes. The profit must be estimated with reference to the whole line of the canal. If a canal runs through six parishes, and a particular toll is payable for going through one of those parishes, the toll is not to be considered as earned altogether in that one parish, but in the whole six. In *Rex v. The Oxford Canal Company*, where the Company were entitled to mileage duties upon goods passing along their own canal, and to compensation duties upon goods passing out of other canals into theirs, the Court held that the Company were rateable for the whole amount produced along the whole line of the canal. In *Rex v. Earl Portmore (e)*, it was held that the proprietors of a river navigation, were rateable to the relief of the poor in a parish through which the navigation passed (though no riverage dues were received in such parish), in proportion to their profits upon the whole line of navigation. Suppose a canal runs through the parishes A., B., C., and D., and the principal traffic is from A. to D., from which the boats must necessarily pass through B. and C.: and suppose that in B. and C. there is a heavier toll imposed, in consequence of there being more locks, or other expenses, there: it cannot be contended in that case, that the tolls imposed in B. and C. are earned there;

(a) 3 B. & A. 112.

(c) 2 D. & R. 793. 1 B. & C. 536.

(b) 2 D. & R. 752. 1 B. & C.

(d) 6 D. & R. 86. 4 B. & C. 74.

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(e) 2 D. & R. 798. 1 B. & C. 551.

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they are in fact the profits of the whole canal, for which B. and C. are entitled to a proportionate share, in respect of the quantity of land in each; and it would make no difference that the part of the canal between B. and C. was made first, for the profits could not be realised until the whole canal was complete.

Shutt and *M' Mahon*, *contra*, were stopped by the Court.

BAYLEY, J.—It appears to me that the sessions, in reducing the rate to which this Company were originally assessed, have not proceeded upon the right rule. The Company are rateable as the occupiers of land in the different parishes through which the canal passes. Tolls, *eo nomine*, are not rateable; but the subject-matter out of which tolls arise may be rated, and that in the present case is the land used as a canal. The land used in making this canal, therefore, is properly the subject of rate in every parish through which the canal passes; and the rate is to be apportioned to the amount of the profit earned by the canal in each respective parish. Here there is a long line of canal, forming one joint concern, the expenses and profits of which are furnished from, and paid into, one common purse; but the canal passes through several parishes, and the profits may be earned unequally, more in one parish and less in another; and if so, the contributions made to the parishes ought to be unequal also, more to one and less to another, in proportion to the profits earned in each. The true principle upon which the proprietors of a canal ought to be rated is, in proportion to the profit which the canal yields, with respect to the use of the land in every parish through which it passes. This Company have not been rated according to that principle; the rate therefore is bad, and must be increased to the amount stated in the case. The distance which a canal runs through a particular parish, is not the proper criterion of rate, but the profit which it earns within that parish;

unless the profit earned in every parish through which it runs is equal, and the whole profit is produced equally along the whole line of the canal: in which case, the distance would be the proper criterion. It will eventually be no injury to the Company, to increase this rate according to the amount of tonnage earned in the parish of Kingswinford, because they will of course procure the rates in the other parishes to be lowered, according to the real proportion of tonnage earned in each; and the result will be, that the Company will be assessed to the same amount, but in different proportions. For these reasons, I am of opinion, that the order of sessions must be quashed, and the rate amended, by increasing it from 9*l.* 16*s.* 11*d.*, to 25*l.* 3*s.* 4*d.*

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HOLROYD, J., and LITLEDAL, J., concurred.

Order of Sessions quashed, and the
Rate amended accordingly.

The KING v. The INHABITANTS of LYTCHET

MATRAVERS. 10. 7. B.H. 226.

TWO Justices, by their order, removed *Isaac Orchard* and *Prudence* his wife, from the parish of *Lytchet Matravers*, in the county of *Dorset*, to the parish of *Saint James*, in the town and county of *Poole*; and the sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case:—

The pauper never acquired any settlement in his own right. His father was settled in the parish of *Lytchet*

settlement. After he had attained 21, the pauper returned to his father's house:—Held, that the pauper was not emancipated when his father acquired the new settlement, and that his settlement shifted with that of his father.

A pauper, under age, hired himself by contract to serve on board a ship trading to Newfoundland. While he was so serving, and before he attained 21, his father acquired a new

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Matravers, and while he was so settled, the pauper hired himself by contract to serve for two summers and a winter on board a ship trading to Newfoundland. In the month of February or March, 1816, being then 20 years of age, he entered upon that service, in which he continued during the stipulated time. There was no evidence that his father ever exercised any control over him during the period of his service. He attained the age of 21 years before his return from the voyage. Shortly after he had left this country, and before he had attained the age of 21 years, his father acquired a settlement in the parish of Saint James, in the town and county of Poole. On the pauper's return from Newfoundland, he went to reside in his father's house, who before that time had left Poole, and returned to Lytchet. After a few weeks he left his father's residence, and lived with his sister, working on his own account, as well there, as during his residence with his father. The sessions were of opinion, that the pauper was emancipated at the time when his father acquired the settlement in Poole.

Barstow, in support of the order of sessions. The sessions have come to the right conclusion. The pauper was emancipated at the time when his father acquired his settlement at Poole. The cases that will be relied on by the other side, as shewing that the pauper in this case was not emancipated, are *Rex v. Huggate* (a), and *Rex v. Wilmington* (b). In the former, the pauper was bound apprentice to a certificated man, and during his apprenticeship, he being of the age of 18, his father gained a new settlement; and the pauper did not return to his father's house until after he was 21: it was held, that he was not emancipated, and that his settlement followed the new settlement of his father. But the facts of that case were materially different from those of the present. In the first place, the pauper there could not by possibility gain a

(a) 2 B. & A. 582.

(b) 5 B. & A. 525. 1 D. & R. 140.

settlement by service under the apprenticeship, because his master was a certificated person; therefore the pauper's domicile continued to be in his father's house: and in the second, he was in the habit of frequently visiting his father during the period of his apprenticeship, and once resided with his father for a considerable time, in consequence of ill health. In *Rex v. Wilmington*, on a question of emancipation, the Court laid down this general rule, in order to exclude discussions in particular cases in future; "that no emancipation is effected during minority, excepting by marriage, becoming the head of another family, or contracting a relation, such as *wholly and permanently* to exclude the father's control." The pauper there was held not to be emancipated, but the facts there were very different from those in the present case; for there the pauper was a mole-catcher, not having entered into any regular contract of service, and he occasionally visited his father while he worked as a mole-catcher, and once slept at his father's house. With respect to the general rule just cited, the present case does not seem to be affected by it, for the circumstances all concur to shew, that the pauper here did contract a relation, so as wholly and permanently to exclude his father's control. Having once done that, and continued in that relation until he was 21 years old, his emancipation became perfect, and related back to the period when he contracted that relation; *Rex v. Rotherfield Greys (a)*, where *Bayley, J.*, said, "In order to constitute emancipation, the son is to be wholly and permanently free from the father's control. Entering into the army subjects him to the control of the crown, so long as he continues in that service; and if he remains in the army until after he is of the age of 21, then his emancipation is perfect, and it would relate back to the time when he originally enlisted."

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Gambier, contra. Unless the doctrine of relation can be prayed in aid of this case, it is impossible to say that this

(a) 2 D. & R. 628. 1 B. & C. 345.

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pauper was emancipated at the time when his father acquired the settlement at Poole, because he was then under age ; and it is submitted, first, that the doctrine of relation is at all events confined to cases where the child has entered into such a contract, as wholly and permanently excludes the parental control, which he has not done here ; and secondly, that that doctrine ought not to be allowed to operate in any case. First,—*Rex v. Cowhoneybourne (a)*, is decisive to shew that the emancipation will not, in this case, relate back to the period of the separation of the pauper from his father during minority. There, the father, upon the death of his wife, broke up housekeeping, and his daughter, then eleven years old, was taken by her uncle, and continued to live with him as one of his family, doing the work of a servant, until she was 27 years old ; her uncle supplying her with clothes and pocket-money. It was held that the daughter, living away from her father before, and after she was 21, the father having no house of his own, nor giving her any support, she ceased (in the words of *Le Blanc, J.*), “*after she became of age,*” to be part of her father’s family. Now there was quite as much, if not more, exclusion of the parental control in that case than in the present, and yet it was held that the daughter was not emancipated before she attained the age of 21. *Rex v. Rotherfield Greys*, and the other cases of soldiers and marines, are perfectly distinguishable from the present. When a person enlists as a soldier or a marine, he enters into a contract for life, and with the crown, whose authority and control over him are paramount to, and absolutely supersede, those of his father. If the doctrine of emancipation were to be extended to the degree contended for on the other side, the parental control would, in consequence, be withdrawn from one third part of the infant population of the country, at the age of eight or ten years. *Rex v. Huggate (b)*, is an express authority for this case. The fact of the master

(a) 10 East, 88.

(b) 2 B. & A. 582.

being a certificated man, made no difference; the only question was, whether the parental control had been wholly and permanently excluded during the child's minority; and the Court held that it had not. The broad principle is this: that the domicile of an infant is always in the country of his nativity, and in the house of his father, unless there is some positive law to alter it. Here the domicile of the pauper continued to be in *England*, and in his father's house, although he himself was at Newfoundland. If the doctrine of relation applies here, it would equally have applied in the case of *Rex v. Huggate*; and if it had applied there, the result would have been that the pauper was emancipated at the age of eighteen, whereas the Court held that he was not emancipated until he was 21. But secondly, the doctrine of relation ought not to be allowed to operate in any case, or at least, the question whether it ought, deserves more grave consideration than it has hitherto received. The dictum attributed to *Bayley, J.*, in *Rex v. Rotherfield Greys* (b), was extra-judicial; the question, whether the emancipation would relate back to the period of minority, was not raised in the case: therefore, the expression of that learned Judge cannot be considered as a deliberate judgment upon the point. There is no case in which it has been solemnly and judicially decided, that the emancipation of a child will relate back to the period of his minority; and the inconveniences with which such a decision would be attended are so numerous and so heavy, that the Court will pause before they impose them.

Cur. adv. vult.

Judgment was afterwards delivered by *BAYLEY, J.*—The question in this case, was, whether the pauper was emancipated at the time when his father acquired a settlement in Poole; or, whether the settlement of the son shifted with that of the father, as being a member of his family. The father was originally settled at Lytchet

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(a) 2 D. & R. 628. 1 B. & C. 345.

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Matravers. The son, being then 20 years old, hired himself upon a voyage to Newfoundland, which he performed, and at the termination of which, he was more than of full age. There was no evidence that the father exercised any species of control over the son, during any part of the period of the voyage. Before the son attained the age of 21, the father acquired a new settlement in Poole, and the question is, whether that new settlement of the father extended to the son. It is perfectly clear, that so long as the child continues actually or virtually a member of the father's family, his settlement shifts with that of his father; but that when the child ceases altogether to belong to his father's family, he is considered in the language of the law as emancipated: and the question is, what circumstances are sufficient to constitute his emancipation. In *Rex v. Offchurch* (a), it was held, that the settlement of a child five years old, leaving the father's family, and living with different relations till ten, followed that of the father; the child not having gained any settlement in his own right. In *Rex v. Witton cum Twambrookes* (b), it was held, that a child was not emancipated so as to lose the benefit of any settlement his father might gain, till 21, or marriage, or till he had gained a settlement in his own right, or till he had contracted a relation inconsistent with the idea of his being part of his father's family. It has been contended in this case, that the pauper contracted such a relation, and that having continued in it till he was of full of age, he was emancipated; and an observation of mine, in *Rex v. Rotherfield Greys* (c), has been relied on, as supporting the argument. But, the case of a minor enlisting in the army, appears to us very different from all other cases upon this subject; and the observations of my brother *Holroyd*, and of Lord Chief Justice *Best*, in the case last mentioned, are very important upon that point. *Holroyd, J.*, said, "the father has by law, a right to the control of his child, until

(a) 3 T. R. 114.

(b) 3 T. R. 355.

(c) 2 D. & R. 628. 1 B. & C. 345.

he is of age, unless some other engagement entered into deprives him of such right. Entering into the army may be considered as an engagement for life, inasmuch as no definite period is mentioned at the time of enlistment, and the party could not leave without the consent of the crown. If the soldier remained in the service until 21, he would *then* be completely separated from his father's family, and a perfect emancipation effected; but the ground on which we decide, that there is no emancipation in this case, is, that before 21 the pauper was discharged from his engagement, and returned again to the father's control, so that by mere enlistment, the father's control is not wholly gone; it only remains in abeyance; and therefore if by any accident the infant is released from his engagements to the crown before 21, the father's control revives, and the emancipation is not effected." *Best, J.*, said, "by the policy of *English law*, the parental authority continues until the child attains 21; but by the policy of the same law, if the country requires the services of the infant, he is at liberty to contract an engagement paramount to the parental control, and subject himself to the dominion of those persons who are put in authority over him. That engagement may, or may not last for life; but if it is dissolved before 21, the parental authority comes again into operation, and the son continues, for the purpose of settlement law, a member of his father's family." So, in *Rex v. Roach (a)*, *Lawrence, J.*, said, "in these cases, if the sons had quitted the army, and returned home before 21, they would have been considered as part of the father's family, and participated in any subsequent settlement acquired by him, until their complete emancipation." So, *Mr. Justice Blackstone*, in his *Commentaries (b)*, says, "the power of a father over the persons of his children ceases at the age of 21, for they are then enfranchised by arriving at years of discretion, or that point which the law has established, when the empire of the father, or other guardian, gives place to the empire of reason. Yet, till that age arrives, this empire of the

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(a) 6 T. R. 247.

(b) 1 Bl. Com. 453.

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father continues, even after his death; for he may by will appoint a guardian for his children. He may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child, who is then *in loco parentis*." All these authorities shew that, generally speaking, the authority of a parent over his child subsists until the age of 21, though it may be transferred, or delegated for a time. But the case of a soldier is a peculiar one. A minor may be taken as a soldier by the act of the state. The rights of the state are paramount to those of a parent; and therefore, an infant is capable of enlisting, and thereby binding himself to the public service. By so doing he becomes severed from his family, and submits himself to a paramount control, which while it lasts, supersedes and releases him from the control of his father. But this is a very different case, and the question here is, whether the pauper, in the words of Lord *Kenyon*, in *Rex v. Witton cum Twambrookes (a)*, "contracted a relation inconsistent with the idea of his being part of his father's family." We are of opinion that he did not. There may be a double control existing over an infant: that of the father for some purposes, and that of the master for others: but still the father's, while it subsists at all, is paramount, and emancipation cannot take place until that is wholly destroyed. In the case of a soldier, the contract entered into by the minor is paramount to the father's control, and if it lasts to the age of 21, the party may be emancipated from the period of the enlistment: here the contract was subordinate to the father's control, which subsisted until the son attained his full age of 21. We are, therefore, of opinion, that the pauper in this case was not emancipated when his father acquired his settlement in Poole; but that his settlement shifted with that of his father: and, consequently, that the sessions were wrong in their opinion, and that their Order must be quashed.

Order of Sessions quashed.

DOE, on the demise of ROBERT WERE, WILLIAM
WERE, and SAMUEL WERE, v. COLE.

12. 7. 1826. 243

EJECTMENT for the recovery of the moiety or half-part undivided of certain lands and premises situate in the parishes of Loddiswell and Churston, in the county of Devon. At the trial before *Gaselee, J.*, at the Devonshire summer assizes, 1826, the plaintiff obtained a verdict, with liberty to the defendant to move to enter a nonsuit; and in the following term, that motion having been made, the Court directed the facts to be stated for their opinion in the following case.

The lessors of the plaintiff made title under a certain deed of conveyance from one *Walter Prideaux*; so much of which as is material to the question in issue, is as follows:

This indenture, made 12th March, 1816, between *Walter Prideaux*, the younger, of the one part, and *Robert Were*, *William Were*, and *Samuel Were*, (trustees named in and by the last will and testament of *Elizabeth Were*, widow, deceased, for and on behalf of *Sarah* the wife of the said *Walter Prideaux*), of the other part. Whereas, upon an account stated and settled between the said *W. P.* and the said *R. W.*, *W. W.*, and *S. W.*, as such trustees as aforesaid, it appears that there was due and owing from the said *W. P.* to the said *R. W.*, *W. W.*, and *S. W.*, on the 1st January last, the sum of 3000*l.* and upwards; and the said *R. W.*, *W. W.*, and *S. W.*, have called upon the said *W. P.* to give them security for the repayment of the said sum of 3000*l.* and upwards, which he the said *W. P.* hath consented and agreed to do in the following manner, (that is to say), by demising and assigning the premises hereinafter demised and assigned, upon the trusts, and in manner hereinafter mentioned, as a security for 3000*l.* part thereof,

A. by deed, "demised, leased, granted, assigned, transferred, set over, directed, limited, and appointed," to *B.* the moiety of certain lands then "in the possession of *A.* and of *C.*," habendum to *B.*, during the life of *A.* in trust for sale. No livery of seisin was indorsed or made. *C.* was, at the date of the deed, tenant from year to year to *A.*, of part of the lands—Held: that an estate for the life of *A.* passed to *B.*, who was entitled to recover in ejectment against *C.*

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and by giving his bond to the said *R. W.*, *W. W.*, and *S. W.*, for the remaining balance : Now, this indenture witnesseth, that in pursuance of the said agreement, and also in consideration of 5*s.* to him the said *W. P.* in hand paid by the said *R. W.*, *W. W.*, and *S. W.*, at or before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, he the said *W. P.* hath demised, leased, granted, assigned, transferred and set over, directed, limited, and appointed, and by these presents doth demise, &c., unto the said *R. W.*, *W. W.*, and *S. W.*, their executors, administrators, and assigns, all that moiety or half-part of and in all that messuage, tenement, or dwelling-house, with the courtlage and garden behind the same, situate, lying, and being in the town of Kingsbridge, &c., and all ways, paths, passages, waters, water-courses, easements, profits, advantages, and appurtenances whatsoever, to the said premises belonging, or in any wise appertaining, and which said premises are now in the tenure or occupation of the said *W. P.*; and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and of every part thereof. And also all that the moiety or half-part undivided of and in all that capital messuage, Barton Farm, and demesne lands, called and known, &c., situate, lying, and being in the parishes of Loddiswell and Churston, in the county of Devon, and which said last-mentioned premises were heretofore in the possession of one *A. K.*, and of the said *W. P.*, and are now in the possession of the said *W. P.* and of *Samuel Cole*. And also all that the moiety or half-part undivided of and in all that messuage or tenement and mill, called Knapp Mill, with the appurtenances, situate, lying, and being in the parish of Loddiswell aforesaid, now in the possession of *J. S.* And also all that the moiety or half-part undivided of and in all that barn and linhay, and all those fields or closes of land called Long Parks, and situate, lying, and being in the parish of Loddiswell aforesaid, now also in the possession of *J. S.* And all houses, out-houses, edifices, buildings, gardens, orchards, lands, mea-

dows, woods, underwoods, ways, paths, passages, waters, water-courses, fishings, fishing-places, easements, profits, advantages, emoluments, hereditaments, and appurtenances whatsoever, to the said several moieties belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, suits and services thereof; and of every part thereof, and all the estate, right, title, interest, term and terms of years, use, trust, property, claim and demand whatsoever, of him the said *W. P.*, his heirs or assigns, either in law or equity, of, into, or out of the same, or any part thereof. To have and to hold the said moiety or half part of the said messuage, tenement, or dwelling-house, in Kingsbridge, with the appurtenances, unto the said *R. W.*, *W. W.*, and *S. W.*, their executors, administrators, and assigns, from the day of the date of these presents, for and during and unto the full end and term of 2000 years thence next ensuing, and fully to be complete and ended. Yielding and paying therefore yearly, and every year during the said term, unto the said *W. P.*, his heirs or assigns, the rent of one pepper-corn, if the same shall be lawfully demanded. And to have and to hold all and singular the several moieties or half parts hereby demised and assigned, or mentioned, or intended so to be, situate, lying, and being in the several parishes of Loddiswell and Churston, with their, and each and every of their several respective rights, members, and appurtenances, unto the said *R. W.*, *W. W.*, and *S. W.*, their executors, administrators, and assigns, from the day of the date hereof, for and during the natural life of the said *W. P.*, without impeachment of or for any manner of waste.

The trusts as to all the aforesaid premises were declared to be for sale, when and as soon as the said *R. W.*, *W. W.*, and *S. W.*, should think proper; and there were covenants by the said *W. P.*, that he had full power to convey the same "for the terms, in manner and form and upon the trusts aforesaid;" and also that it should and might be lawful to and for the said *R. W.*, *W. W.*, and

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S. W., their heirs, executors, administrators, and assigns, from time to time and at all times during the several estates and terms thereby granted, demised and assigned, peaceably and quietly to enter in and upon, have, hold, use, occupy, possess and enjoy, all and singular the premises thereby granted, demised and assigned, or mentioned or intended so to be, and to receive and take the rents, issues, and profits thereof, and of every part thereof.

This indenture was duly executed by the said *W. P.*, at the time of its date. No livery of seisin was indorsed upon it, and no evidence was offered that any had in fact been made. The defendant, *Samuel Cole*, before and at the time of the execution of this indenture, was tenant from year to year to the said *W. P.*, of part of the lands and premises comprised in the deed, and therein described as being situate in the parishes of Loddiswell and Churston.

Since the execution of this indenture, that is to say, in October, 1825, the said *W. P.* became a bankrupt, and the defendant, *Samuel Cole*, having disclaimed to hold under the lessors of the plaintiff, defended this action of ejectment, under an indemnity from the assignees of the said *W. P.*

The question for the opinion of the Court is, whether the deed above abstracted, passed to the lessors of the plaintiff any and what estate in that part of the lands and premises mentioned in the deed, and therein described as being situate in the parishes of Loddiswell and Churston, of which the said *Samuel Cole* was, at the time of the execution of the deed, tenant from year to year to the said *W. P.*, as aforesaid.

Follett, for the lessors of the plaintiff. The deed in question passed to the lessors of the plaintiff an estate for life of the grantor in the premises sought to be recovered in the action. At the time of the execution of the deed, those lands were in the possession of a tenant from year to year. To pass an estate of freehold in possession, it must be admitted that livery of seisin is necessary,

unless the conveyance operate under the Statute of Uses ; but to pass a reversion expectant, either on a freehold or a term for years, a deed of grant with the attornment of the tenants (while attornments were necessary), was the proper mode of conveyance ; and since the stat. 4 Ann. c. 16, which takes away the necessity of attornments, it will pass by the delivery of the deed only. The authorities upon this point are clear and decisive. In *Co. Litt.* 40 a, Lord Coke says, " So to conclude this point—of freehold and inheritances some be corporeal, as houses and lands, and these are to pass by livery of seisin, by deed, or without deed. Some be incorporeal, as advowsons, rents, commons, estovers, and these cannot pass without deed, but without any livery. And the law hath provided the deed in place or stead of a livery. And so it is if a man make a lease, and by deed grant the reversion in fee, here the freehold with attornment of the lessee by the deed doth pass, which is in lieu of the livery." Mr Justice Blackstone, in 2 *Comm.* 317, speaking of incorporeal hereditaments which are the subjects of grant, says, " These, therefore, pass merely by the delivery of the deed. And in signiories or reversions of lands, such grant, together with the attornment of the tenant (while attornments were requisite), were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate possession. It therefore differs little from a feoffment, except in its subject-matter : for the operative words therein commonly used are, *dedi et concessi*, " have given and granted." The same principle is laid down in *Shep. Touch.* 210, 228 ; *Bac. Abr. Leases* (N) ; 1 *Wms. Saund.* 234, note 3 ; and *Dyer*, 33. Here, there are the words *dedi et concessi* in the deed, and therefore the principle applies. Neither does it make any difference that the estate in this case is one for years only. *Littleton*, in s. 567, says, " also, if a man letteth tenements for term of years, by force of which lease the lessee is seised, and after the lessor by his deed grant the reversion

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to another for term of life, or in tail, or in fee; it behoveth in such case, that the tenant for years attorn, or otherwise nothing shall pass to such grantee by such deed. And if in this case the tenant for years attorn to the grantee, then the freehold shall presently pass to the grantee by such attornment, without any livery of seisin; because if any livery of seisin should be, or were needful to be made, then the tenant for years should be at the time of the livery of seisin ousted of his possession, which shall be against reason." Lord *Coke's* comment upon that section, is an express authority in favour of the lessors of the plaintiff in this case. He says, "here *Littleton* having spoken of grants of seigniories and rent charges, and rents seck issuing out of land, here treateth of a grant of a reversion of land upon an estate for years; seeing this grant of the reversion must be by deed, and the agreement of the lessee for years requisite thereunto, the freehold and inheritance do pass thereby, as well as by livery of seisin, if it were in possession; and the grant of reversion by deed, with the attornment of the lessee, do countervail in law, a feoffment by livery, as to the passing of the freehold and inheritance (a)." The following section of *Littleton*, 568, and also, s. 572, are to the same effect,

It will be contended on the other side, that it was not the intention of the grantor here, that the estate should pass as a reversion; but that is immaterial, for it is clear that he intended it to pass: and where the intent is apparent that the land shall pass at all events, it will pass by any mode within the scope of the deed, and though it cannot pass by the mode contemplated by the grantor, it will pass by any other mode by which it can pass. For this position there are many authorities: *Roe v. Tranmer* (b), *Doe v. Salkeld* (c), *Shove v. Pincke* (d), *Haggerston v. Hanbury* (e).

(a) Co. Litt. 315 b.

(d) 5 T. R. 124.

(b) Willes, 682. 2 Wilson, 75.

(e) 7 D. & R. 723. 5 B. &

(c) Willes, 673.

C. 101.

Coleridge, contrà.—Looking at the language of the deed, and the statement of facts in the case together, it is perfectly clear that the object of the parties was, that the immediate possession of the lands, and not the mere reversion of them, should pass by the deed. *Prideaux*, the grantor, was in possession of part of the premises at the date of the deed; *Cole*, the defendant, was also then in possession of part: those facts appear upon the case, but it does not appear *what* part *Cole* was in possession of, and the presumption of law is, that he and *Prideaux* had the undivided possession as joint tenants. Now, if the lessors of the plaintiff should recover, the sheriff could legally give them possession of that part of the premises only of which *Cole* had the possession at the date of the deed, and as that does not appear by the case, he would not know of what part to give them possession. [*Little-dale*, J. The lessors of the plaintiff must act in that respect at their own peril; the Court have nothing to do with that. But the case finds that the defendant had possession of *some* part of the premises at the date of the deed, which must be taken to mean the separate possession; and the ejectment is brought for that part only. I do not see, therefore, that the difficulty suggested can arise.] The deed is bad for uncertainty; for it does not shew clearly what part of the premises it was intended to pass: therefore it cannot be good to pass any part. [*Bayley*, J. It will pass such part as *may* by law pass under it.] The general principles laid down on the other side cannot be controverted, and if the Court think them applicable to the present case, the argument intended to be raised for the defendant cannot be supported.

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BAYLEY, J.—I consider this a very plain case in favour of the lessors of the plaintiff. All lands lie either in livery or in grant; and those only lie in livery of which the owner has the power of giving possession: but the very reverse of that position must be substantiated in order to

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entitle the defendant in this case to judgment. The case put by Lord Coke, in *Co. Litt.* 49 a (a), is decisive of the present. He says, "if a man make a lease, and by deed grant the reversion in fee, here the freehold, with attornment of the lessee by the deed doth pass, which is in lieu of the livery." The condition with respect to the attornment may be put out of consideration, because, since the statute of *Ann* (b), attornment has become unnecessary. Then, here, there is a lease for years, and a grant of the reversion; the reversion lies in grant, and the words of the deed are amply sufficient to pass the reversion. Upon the short ground that the grantor here had no power to give possession (c), and that the land, therefore, lay not in livery, but in grant, I am of opinion that the deed in this case was available to pass the reversion of the lands sought to be recovered, and, therefore, that the lessors of the plaintiff are entitled to judgment.

HOLROYD, J., and LITTLEDALE, J., concurred.

Judgment for the plaintiff (d).

(a) 2 Tho. Co. Litt. 353.

(b) 4 Ann. cap. 16, sec. 9.

(c) See *Bettisworth's* case, 2 Co. Rep. 29 b. Sir Fra. Moore, 250. 2 Roll. Rep. 4, S. C. Co. Litt. 48 b, 369 b.

(d) Vide *Earl of Clanrickard's* case, Hob. Rep. 277. *Goodtitle dem. Edwards v. Bailey*, Cowp. 597. *Solly v. Forbes*, 4 J. B. Moore, 448. 2 B. & B. 38. S. C. Shep. Touch. 82, 83.



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J. C. 7. B. 206.
THIS was an action of debt, brought by *William Morrant* and *Ann* his wife, upon the bond of *Thomas Sandy*, bearing date, 5th November, 1793, against *Roger Thomas Gough*, as devisee of the said *Thomas Sandy*, and *William Sandy*, as heir of *Samuel Sandy*, who was heir of *Thomas Sandy*, whereby he became "bound unto the said plaintiff *Ann*, in the sum of 20*l.*, to be paid yearly during her natural life : at the decease of the said *Ann*, to return to the heir of the said *T. Sandy*, to be paid to the plaintiff *Ann*, at the decease of the said *T. Sandy*, or his certain attorney, executors, administrators, or assigns : for the true payment whereof, the said *T. Sandy* did bind himself, his heirs, executors, and administrators, firmly by these presents, &c." The declaration then averred the death of the obligor, and the non-payment "of 50*l.* for divers, to wit, two and a half years of the said yearly payment." The defendant *W. Sandy*, cravedoyer of the bond, which was set out, and the condition of which appeared to be this : "that if the above-bounden *T. Sandy*, his heirs, executors, and administrators, at the decease of *T. Sandy*, shall and do well and truly pay, and cause to be paid, unto the above-named *Ann Morrant*, during her natural life (at the decease of the said *Ann Morrant*, to return to the heir of *T. Sandy*, then living), the full sum of 20*l.* to be paid yearly, at the decease of the said *T. Sandy*, then, &c." The defendant *William Sandy*, then pleaded, first, *non est factum antecessoris* ; secondly, *riens per descent* from *T. Sandy* the obligor, to *S. Sandy* ; thirdly, *riens per descent*, from *T. Sandy* to *S. Sandy*, and from *S. Sandy*, to defendant *W. Sandy* ; fourthly, an immoral consideration as between the obligor and obligee.

The replication to the pleas of the heir, after suggesting

ceased on the death of testator's son ; and that the devisee was not liable to *A. M.*, for any arrears of her annuity which had accrued due since his death, although the rents and profits exceeded the annuity.

The obligor of a bond, without penalty, conditioned for the payment to *A. M.* during her life, of 20*l.* a year, bequeathed to his wife 30*l.* a year for her life, and devised to defendant all his freehold messuages, &c., in trust to educate his son until 21, and to account for profits at that time ; provided that if his wife should be living when his son attained full age, the devisee should retain and hold in trust such of his estates as would secure to his wife the said 30*l.* a year." Testator's wife died during his lifetime, and testator afterwards died leaving his son surviving, who afterwards died under age.
 —Held : that the estate of the devisee

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the death of the plaintiff, *W. Morrant*, took issue upon the plea of *non est factum*, alleged assets by descent, and denied the immoral consideration. The rejoinder of the heir took issue upon the last three replications. The defendant *Gough* pleaded (a), first, *non est factum devisatoris*; secondly, *riens per devise*; and thirdly, that the said *T. Sandy*, on, &c., at, &c., duly made and published his last will and testament in writing, whereby, amongst other things, he gave and bequeathed unto his wife *Mary Sandy*, the sum of 20*l.* yearly, and every year, for and during her natural life, to be computed from his decease, and to be paid her by his executors thereafter named, from such of his estate thereby devised to them in trust; and he thereby appointed his brother *Charles Sandy*, and the said *R. T. Gough*, his executors and trustees, and gave and devised unto the said *C. Sandy*, and *R. T. Gough*, all his freehold and leasehold messuages, whereof he the said *T. Sandy* was seised in fee, situate in the parishes of Titchfield and Fareham, and then in the occupation, &c.; and also all his bonds, notes, and securities for moneys, of whatsoever nature or kind, in trust for his son *Thomas Sandy*, and that they, the said *C. Sandy* and *R. T. Gough*, should receive the rents, profits, and interest thereof, and apply the same for the purpose of maintaining and educating his said son *T. Sandy*, until he should attain the age of 21 years. And the said *T. Sandy*, the testator, did thereby authorise, empower, and direct the said executors, and the survivor of them, and the executor and administrator of such survivor of them, from and after his decease, and until his said son should attain the age of 21 years, to manage and improve the estate and fortune of his said child, according to their discretion, and that they should pay unto, and account

(a) Oyer was not prayed by defendant *Gough*, nor does it appear to have been necessary, as the bond and condition, when set out

upon the oyer, granted to defendant *Sandy*, became part of the declaration.

with, his said son, for such rent, interest, produce, and improvements as should arise, or be made or produced from such estates and moneys, when he should attain the age of 21 years. And it was provided in and by the said will and testament, that should his the said testator's wife *Mary Sandy*, be living at the time his said son should attain the age of 21 years, that then the said executors and trustees *should retain and hold in trust as much of his the said testator's said estates as should secure to his said wife the aforesaid sum of 20l. a year, for and during her natural life*, as therein before expressed. And he did thereby devise the guardianship, care and education of his said child, during his minority, unto the said *C. Sandy* and *R. T. Gough*, and the survivor of them. And the said *R. T. Gough* saith, that the said *Mary*, the said wife of the said *T. Sandy*, in the said will mentioned, afterwards, and before the death of the said *T. Sandy*, at, &c., died, and that the said *T. Sandy*, afterwards, (to wit), on the 20th March, 1787, died without altering or revoking his said will, the said *T. Sandy*, the said son of the said testator being then and there living. And the said *R. T. Gough* further saith, that afterwards, and long before the exhibiting of the bill of the said plaintiffs in this behalf, (to wit), on the 1st January, 1809, the said *T. Sandy*, the said son of the said *T. Sandy*, the testator in the said will mentioned, died under the age of 21 years, to wit, at, &c.; whereupon all the estate and interest, right and title, of the said *C. Sandy* and *R. T. Gough*, in and to the said premises, in the said will mentioned, and every part thereof, the same being all the lands, tenements, and hereditaments, whereof the said *T. Sandy*, the testator, was seised at the time of his death, utterly ceased and determined. And the said *R. T. Gough* further saith, that long before the exhibiting of the said bill of the said plaintiffs, (to wit), on the 25th June, 1818, all the moneys which at any time during the life-time of the said *T. Sandy*, the son, became due and payable for and

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in respect of the said yearly sum of 20*l.* in the said writing obligatory mentioned, were paid and satisfied to the said plaintiffs, to wit, at, &c. The replication, after suggesting the death of *T. Morrant*, and joining issue upon the first plea, and taking issue upon the second, by alleging assets by devise, as to the third plea averred, *precludi non*; because she says, that before the commencement of this action, after the death of the said testator, in the said declaration mentioned, and during the life-time of the said *T. Sandy*, the said son of the said testator, to wit, on the 1st January, 1798, he the said defendant *R. T. Gough*, had notice of the said bond having been so made as aforesaid, and being then outstanding in the hands of the said plaintiff, and that the rents, issues, and profits of the said lands, tenements, and hereditaments, so devised to the defendant *R. T. Gough*, as aforesaid, arising and issuing thereout, for and during the time which elapsed between the death of the said *T. Sandy*, the said testator, and the death of the said other *T. Sandy*, did amount to much more than sufficient to pay and satisfy to the said plaintiffs all the moneys which at any time during the life-time of the said *T. Sandy*, the son, became due and payable for and in respect of the yearly sum of 20*l.* in the said writing obligatory mentioned, to wit, on the 1st January, 1815, and wherewith the said debt in the said declaration, and the damages aforesaid, could, might, and ought to have been satisfied.

General demurrer, and joinder in demurrer.

Carter, in support of the demurrer, contended: first, that the defendant *Gough* was not such a devisee as was chargeable at all; and secondly, that the estate of the devisee, and his liability, had ceased before the present arrears accrued. The defendant took only a chattel interest. In *Goodtitle v. Whitby (a)*, a devise, in trust to

lay out rents and profits for the maintenance of two nephews, and when they attained 21, to them and their heirs, was held to vest the estate in the nephews immediately, with a trust to be executed for their benefit during their minority. In *Goodright v. Parker* (a), a devise to trustees, until *J. T. S.* should reach 21, was held to give the trustees an estate only during the minority of *J. T. S.* Devise to *A.* until *B.* shall attain 40 years; *B.* dies under 40; *A.*'s estate ceases; *Lomas v. Holmeden* (b). If the defendant *Gough* received any surplus rents, he would be liable to account for them to the personal representative of *T. Sandy*, the son.

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Manning, *contrà*. The statute of fraudulent devises (c), extends not only to devises of lands in fee, but also to any rent, profit, term, or charge, out of the same, provided the deviser be seised in fee (d). It is therefore clear that this devise was fraudulent within the statute, although it

(a) 1 M. & S. 692.

(b) 8 P. Wms. 176.

(c) 3 & 4 W. & M. c. 14.

(d) By section 2 of that statute, after reciting that "it is not reasonable that by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts, and nevertheless it hath often so happened, that where several persons having by bonds, or other specialties, bound themselves and their heirs, and have afterwards died, seised in fee-simple of and in manors, &c., or had power or authority to dispose of or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their last wills and testaments devised the same, or disposed thereof in such manner as such creditors have lost their said

debts," it is enacted, "that all wills and testaments, limitations, dispositions, or appointments, of or concerning any manors, &c., or of any rent, profit, term, or charge out of the same, whereof any person at the time of his or her decease shall be seised in fee-simple, in possession, reversion, or remainder, or have power to dispose of the same by his or her last will and testament thereafter to be made, shall be deemed and taken only as against such creditor or creditors as aforesaid, his, her, or their heirs, &c., to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect, any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary, notwithstanding.

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should be held that a chattel (a) interest only vested in the trustees. Then has the liability ceased?—In order to pay the 20*l.* a year during the life of the widow, and to enable the trustees to select what estates they should retain after *T. Sandy*, the son, became of age, it was necessary that the fee should continue in them. It is true that the necessity for such retention was obviated, by the fact of the wife's having died in the life-time of the testator, but the effect of the clause, as denoting the quantity of estate which the testator meant to devise to these trustees, is the same. But supposing that only a chattel vested in the trustees, the whole interest of the devisee must be liable to the specialty debts of the devisor absolutely, and not merely during the continuance of the estate; as otherwise a party indebted in a sum to be paid in futuro, and by instalments, might defeat his creditors, or might materially lessen their remedy, by creating a number of successive estates by devise. This is shewn by the present pleadings, which admit a surplus in the hands of the defendant *Gough*, arising from the real estate of the obligor, and which surplus, if no devise had been made, would have been assets in the hands of the heir for the payment of this debt; whereas it is here contended, that such surplus belongs to the personal representative of *T. Sandy*, the son. The trust can make no difference as between the creditor and devisee, and the latter, according to the doctrine contended for, would be equally entitled to retain such surplus to his own use.

Carter, in reply. There was no breach of the bond, during the continuance of the defendant's interest.

(a) See *Warter v. Hutchinson*, 3 D. & R. 58, 1 B. & C. 721, in which this Court certified to the Vice-chancellor, that the devisees under circumstances nearly similar took a chattel interest only. After this case it seemed hopeless to contend that an estate in fee passed

by the devise; but it was necessary to obtain the judgment of the Court on this point, lest after suffering it to pass *sub silentio*, the plaintiff might be told upon the trial of the issue of rens per descent, that it was open to the heir to contend that the fee was in *Gough*.

BAYLEY J.—It seems to me that the plea is good, and that the replication is no answer to it. This is not the case of a common bond; this bond contains no penalty. In the case of lands descended, as the estate passes from one heir to another, the liability descends with it. If a man devises to trustees to do something for a given person, when that purpose is at an end, the estate ceases. This will be construed as if the provision respecting the wife had been left out, she having died in the life-time of the testator. As soon as the interest of the devisee ceased, his liability ceased also.

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HOLROYD J.—It is perfectly clear that there was no estate in fee in the devisees. This is not the case of a common bond. The profits were not to be kept to meet the growing payments.

LITLEDALE J.—The devisee took only a particular estate, and a devisee of a particular estate is only liable for profits accruing during his own time. If this had been a bond with a penalty, the land would have been immediately liable. If all arrears accruing in the life-time of the testator, and during the particular estate were paid, the defendant is not liable. This is not a debt accruing in the life-time of the testator. The devise would be fraudulent if it operated to prevent the creditor from recovering, as against the heir. If we were to hold the defendant liable there would be a difficulty as to the mode of issuing execution. In an action against the heir, the land would have been liable by extent only (*a*); here there can be no judgment against the land.

Judgment for the defendant *Gough*.

(*a*) By 3 & 4 W. & M. c. 14, s. 3, it is provided, that “for the means that such creditors may be enabled to recover their said debts in the cases before mentioned, every such creditor shall and may have and maintain his action of debt upon his said bonds

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and specialties against the heir and heirs at law of such obligor or obligors, and such devisee or devisees, jointly, by virtue of this act; and such devisee or devisees, shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended." The facts stated in the plea of the defendant *Gough* being admitted by the replication, no general judgment charging the defendant personally, as in cases where the heir pleads a false plea, 2 Saund. 76, could have been pronounced, *in respect of the allegations in the plea*. But in *Henningham's* case, *Dyer*, 344, the reporter, *Sir James Dyer*, J., says, that if the profits of the land descended *a morte patris usque ad diem brevis*, amount to sufficient to satisfy the debt, and the plaintiff will shew that to the Court, the plaintiff shall have general judgment and execution immediately.

Though every contract of a devisor by which his heir would have bound, had the assets been suffered to descend, appears to be within the mischief pointed at in the preamble (ante 45, note (d)); yet, as the third section of this statute gives an *action of debt* only, the remedy against the devisee has been considered to be confined to those cases in which that form of action is maintainable. Thus it has been held not to extend to a covenant for title entered into by the devisor upon the sale of an estate, *Wilson v. Knubley*, 7 East, 128; 3 Smith, 123, S. C.; 2 Wms. Saund. 8. So voucher, *warrantia chartæ*, annuity, &c., would no doubt be considered as falling within the rule. It has however been held, that by the giving of this specific remedy by action of debt, the courts of Equity are not precluded from relieving the creditor against the devisee under this statute, Eq. Ca. Ab. 149. 3 Bac. Abr. 461, *Heir and Ancestor* (F). in marg.

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BISHOP and another v. PENTLAND.

J. P. 7 Nov. 219
THIS was an action of assumpsit, tried before *Hullock*, B., at the last Spring assizes for Lancaster, when a verdict was found for the plaintiffs, with an arrangement as to damages, subject to the opinion of the Court upon the following case.

The action is brought upon a policy of insurance on goods warranted free from average, unless general, or the ship be stranded. The defendant has paid into Court the sum of 49*l.* 11*s.* 11*d.*, being the amount of the general average on the goods. The plaintiffs claim for a particular average, and partial loss, under the following circumstances. On the 21st November, 1824, the ship, in which the goods were loaded, was, while proceeding on her voyage from Liverpool to Gibraltar, necessarily obliged to go into the harbour of Peel, in the Isle of Man, which is a tide harbour, and dry every tide. She was brought in by some fishermen belonging to Peel, who had gone out to her assistance, and under whose directions she was moored along the quay, where ships of her burthen and build, coming into the harbour of Peel, usually are moored, and in as safe a situation as could be found. The ship was a very sharp built ship, which rendered it necessary, in addition to the usual moorings, to lash her, by a tackle fastened to the mast, to posts upon the pier, to prevent her falling over upon the tide leaving her. For this purpose one of the fishermen, and acting as pilot, named *John Sayle*, asked the mate of the vessel for a rope, who gave him one, and which rope one of the witnesses stated that the mate informed him was a new rope, though the witness did not see it. The fisherman objected to it, had not broken, the accident would not have happened:—Held, that the ship was stranded, within the meaning of the policy.

Stranding, is where a ship, by an accident, and out of the ordinary course of her voyage, gets upon the strand, and receives injury in consequence. Negligence of the crew does not discharge the underwriters, if the loss is occasioned by one of the perils insured against.

Policy on goods "warranted free from average, unless general, or the ship be stranded." On the voyage, the ship was driven by necessity into a harbour, dry every tide, where she was moored along the quay, in the place usual for ships of her burthen, and in as safe a situation as could be found; and being sharp built, she was lashed to the pier by a rope from her mast head, which the mate insisted to be sufficient, though it was objected to by the pilot who had brought the ship in. When the tide ebbed, the rope broke, and the ship fell over, and bilged, and the goods in consequence were damaged. If the rope

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stating that it was insufficient for the purpose intended ; to which objection, the mate replied, " that it was sufficient to drag the mast out ;" and the rope was thereupon made use of in lashing the vessel to the pier. The state of the harbour where the vessel lay would have had no effect upon the vessel, if she had been properly lashed, and the vessel would have sustained no damage in the harbour, if the rope and lashing had not given way ; and which rope was used contrary to the opinion of the said *John Sayle*. On the morning of the 23rd November, when the tide was out, the tackle, by which the ship was lashed to the posts, broke, and the ship fell over upon her side, by which she was stove in and greatly injured. But for the breaking of the tackle, the ship would have remained in the same situation that ships usually are in Peel harbour, during ebb, and no accident would have occurred.

The question for the opinion of the Court is, whether the situation of the ship, after her falling over, constituted a stranding, within the meaning of the policy. If the Court shall be of opinion that there was such a stranding, the verdict is to be entered for the plaintiffs ; if otherwise, for the defendant.

F. Pollock, for the plaintiff. This was a clear case of stranding, within the meaning of the policy. The situation of the vessel must be considered without reference to the sufficiency or insufficiency of the rope by which she was lashed to the quay. The crew may have been guilty of negligence in furnishing an insufficient rope, and the damage to the goods may have been remotely occasioned by that negligence ; but that circumstance will not affect the plaintiff's right to recover against the underwriters, if the ship was stranded, and the damage was immediately occasioned by perils of the sea. For this position there are two decisive authorities ; *Busk v. The Royal Exchange Assurance (a)*, where it was held, that in an action on a

(a) 2 B. & A. 73.

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policy on a ship, which, among other risks, the underwriters insured against fire, and barratry of the master and mariners, they were liable for a loss by fire occasioned by the negligence of the master and mariners: and *Walker Maitland (a)*, where it was held that the underwriters on a policy were liable for a loss arising immediately from perils of the sea, such as the winds and waves, although remotely from the mismanagement and negligence of the master and mariners. Then the recent case of *Barrow v. Bell (b)* is an express authority for saying that the ship in this case was stranded, and that the damage was occasioned immediately by perils of the sea. There, the policy was on goods, with a warranty against average, unless general, or the ship should be stranded. On the voyage, the ship was driven by stress of weather into a harbour, at the mouth of which she struck upon an anchor, and was in danger of sinking: to prevent which she was warped higher up in the harbour, where she took the ground, and remained fast half an hour: and it was held, that the ship was stranded, within the meaning of the policy. Here the ship was driven into the port by stress of weather; when the tide ebbed out, she was left dry; and while in that situation she fell over, in consequence of which, when the tide rose again, the goods were wetted. It was, therefore, clearly a peril of the sea that immediately occasioned the damage. A former case of *Carruthers v. Sydsbotham (c)*, comes still nearer to the present in its facts, though it is not stronger in principle. There, a ship, being under the conduct of a pilot, in her course up the river to Liverpool, was, against the advice of the master, fastened at the pier of the deck-basin, by a rope to the shore, and left there, and she took the ground, and when the tide left her, fell over on her side and bilged; in consequence of which, when the tide rose, she filled with water, and the goods were wetted and damaged: and it was held, that this was a

(a) 5 B. & A. 171.

(c) 4 M. & S. 77.

(b) 7 D. & R. 244. 4 B. & C. 730.

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stranding to entitle the assured to recover for an average loss upon the goods.

Kaye, contra. First, this was not a stranding within the meaning of the policy ; and secondly, even if it was, the loss was occasioned by the negligence of the crew, and not by perils of the sea, and therefore the defendants are not liable. *Busk v. the Royal Exchange Assurance* (a), does not at all apply, because there the loss was occasioned by fire, which was one of the risks expressly insured against. In *Carruthers v. Sydebotham* (b), the mooring of the vessel was an act done against the advice of the master ; here the ship was moored in the usual and proper way, and with the concurrence of the crew ; so that the two cases are materially different. It is impossible to say, that the loss in this case was occasioned by perils of the sea ; or that the vessel, being left dry in the harbour, by the ordinary ebbing of the tide, was a stranding. *Hearne v. Edmonds* (c) was precisely like this case. There the vessel, in the course of her voyage up the Cork River, was left dry by the ebbing of the tide, and while in that situation received damage ; and that was held not to be a stranding ; and that case was cited, and its authority not impeached, in *Barrow v. Bell* (d). In *Walker v. Maitland* (e), the negligence of the master and mariners was the remote cause of the damage ; but here it was the immediate and only cause ; for if the ship had been secured with a sufficient rope, the accident would not have happened. *Thompson v. Whitmore* (f), is an authority to shew, that the loss here was not occasioned by perils of the sea ; for there the ship was hove down on a beach, within the tide-way, to repair, and was thereby bilged and damaged ; and it was held that that was not a loss occasioned by perils of the sea.

(a) 2 B. & A. 73.

(b) 4 M. & S. 77.

(c) 4 J. B. Moore, 15. 1 B. & B. 388.

(d) 7 D. & R. 244. 4 B. & C. 730.

(e) 5 B. & A. 171.

(f) 3 Taunt. 227.

F. Pollock, in reply. This case is perfectly distinguishable from *Hearne v. Edmonds*, because there the ship was in the ordinary course of her voyage when she took the ground, and her being left dry was no more than occurred necessarily to every ship that went up the Cork River ; so that if that had been held a stranding, it must as a consequence have been held, that every ship going up the Cork River was stranded ; but here the ship was out of the ordinary course of her voyage, and was driven into the harbour by stress of weather. It is true, that in *Carruthers v. Sydebotham* (a), the mode in which the vessel was moored, was adopted against the advice of the master ; but there is nothing in that case to shew, that the underwriters would have been held discharged from liability even if there had been negligence on the part of the crew ; and *Busk v. the Royal Exchange Assurance* (b), and *Walker v. Maitland* (c), were both decided subsequently to that case. But *Rayner v. Godmond* (d) is a still more recent decision on the same point. There, during the course of a voyage on an inland canal, it became necessary, in order to repair the canal, to draw off the water ; and the ship, in consequence, having been placed in the most secure situation that could be found, when the water was drawn off, took the ground by accident on some piles, which were not previously known to be there ; and it was held that this was a stranding, the accident not having happened in the ordinary course of a voyage. And *Bayley, J.*, in that case, observed, that the two cases of *Hearne v. Edmonds* (e) and *Carruthers v. Sydebotham*, were reconcilable, and that the true construction was, “ that where, in the ordinary course of the voyage, the ship must go on the strand, the underwriter is exempt ; but where it arises from an accident, and out of the ordinary course, he is liable.” There is another authority to shew that the

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(a) 4 M. & S. 77.

(b) 2 B. & A. 73.

(c) 5 B. & A. 171.

(d) 5 B. & A. 225.

(e) 4 J. B. Moore, 15. 1 B. & B. 388.

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loss here was occasioned by perils of the sea. *Fletcher v. Inglis (a)*. There, a transport, in government service, was insured for twelve months, during which service she was ordered into a dry harbour, the bottom of which was uneven, and on the tide having left her she received damage by taking the ground; and it was held, that this was a loss by perils of the sea.

BAYLEY, J.—There are two questions here. First, was the ship stranded, within the meaning of the policy? Secondly, if she was, still, was there such negligence on the part of the crew as exonerated the underwriters from their liability? Now, with respect to negligence, the two cases cited, in the first instance, by Mr. *Pollock*, are in my opinion decisive to shew, that the negligence or mismanagement of the master or mariners will not discharge the underwriters, provided the loss is occasioned by one of the perils against which they have insured. Then, the only question here is, whether the loss was occasioned by perils of the sea, or, in other words, whether the ship was stranded. I consider the fair meaning of the word “*stranded*,” to be, where the ship, by an accident, and out of the ordinary course of the voyage, gets upon the strand, and receives injury in consequence. If that is a correct definition, *Hearne v. Edmonds (b)* was properly held not to be a case of stranding, because there the ship was not out of the ordinary course of her voyage, and she got upon the strand not by an accident, but necessarily and ordinarily, in common with every ship that makes the voyage up the Cork River. But *Carruthers v. Sydebotham (c)*, *Rayner v. Godmond (d)*, and a case, not cited, of *Hodgson v. Malcolm (e)*,

(a) 2 B. & A. 315.

(b) 4 J. B. Moore, 15. 1 Brod. Bingham. 388.

(c) 4 M. & S. 77.

(d) 5 B. & A. 225.

(e) 2 N. R. 336. There, in moving a ship from one part of a

harbour to another, it became necessary to send two of the crew on shore to make fast a new line, and cast off the rope by which the ship was made fast; those two men being immediately impressed and carried away, and not being al-

were properly held to be cases of stranding, within the definition that I have given of that word, and seem to me to govern this case. Upon the ground, therefore, first, that the negligence of the crew does not discharge the underwriters, where the loss is occasioned by a peril insured against; and secondly, that this ship was stranded by an accident, and out of the ordinary course of her voyage, and the goods damaged in consequence, that being a peril insured against, I am of opinion that the defendants are liable upon this policy, and that the plaintiff is entitled to judgment.

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Judgment for the plaintiff.

lowed by the press-gang to cast off the rope in question, the ship, in consequence, went ashore and was lost; and it was held, that this was a loss by perils of the sea, within the policy.

HOLDERNESSE and another, Assignees of FOXTON, a Bankrupt, v. COLLINSON and another.

S.C. 7. Nov. 2/2.

TROVER.—At the trial before Bayley, J., at the Yorkshire Lent Assizes, 1826, a verdict was found for the plaintiffs, with an arrangement as to the damages, subject to the opinion of the Court upon the following case:—

The plaintiffs are the assignees of *Thomas Foxton*, a bankrupt. The defendants are wharfingers, and owners of a wharf and warehouse, at Hull. The bankrupt was a merchant at Hull, and, previously to his bankruptcy, from time to time, landed goods at the defendants' wharf, and placed them in their warehouse, part of which were delivered by agreement; but where the right is disputed in the place where the wharfinger lives, he cannot set it up against a customer, unless he has previously given him notice that he will deal only upon those terms.

A wharfinger has not a general lien in respect of labourage and warehouse-room, except by agreement, express or implied. General, continued, and undisputed usage, may be evidence of such

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vered by the defendants to the bankrupt before his bankruptcy. At the time of *Forston's* bankruptcy, there were lying in the defendants' warehouse 9 tons, 4 cwt., 3 qrs. and 27 lbs. of flax, and 848 bags and 20 bundles of mats, the property of *Forston*. The flax was the remainder of a larger parcel, of 17 tons, 5 cwt., 2 qrs., and 15 lbs., which had been landed at the defendants' wharf, placed for some time in their warehouse, and in part delivered to *Forston*, previously to his bankruptcy. At the time of the bankruptcy, there was due to the defendants by *Forston*, the sum of 72*l.* 14*s.* 2*d.*, which included not only the charges due to the defendants, for the wharfage, labourage (which comprises landing, weighing, and delivery), and rent, of the entire 17 tons, 5 cwt., 2 qrs., and 15 lbs. of flax, and the bags and mats, but also charges of the same nature due to them in respect of other goods, which had been delivered to *Forston* before his bankruptcy. After that event, and before the commencement of this action, the plaintiffs tendered to the defendants the sum of 41*l.* 10*s.* 3*d.*, which included the entire amount of all charges due to the defendants for wharfage generally, and also all charges of every kind (including wharfage, labourage, and rent), up to the time of the tender, due to them in respect of the entire 17 tons, 5 cwt., 2 qrs., and 15 lbs. of flax, and the bags and mats, and demanded of the defendants the delivery of the flax, and bags, and mats, then in their possession. This the defendants refused, claiming a general lien on the goods for wharfage, labourage, and rent, while the plaintiffs insisted that their general lien extended to wharfage charges alone, and not to labourage, or rent. It was agreed by both parties, plaintiffs and defendants, that it should be taken as proved that in many instances where proprietors of goods have become insolvent, the wharfingers in Hull had claimed to have a lien on the goods in their possession for the amount of their running account with such insolvents, comprising therein charges for wharfage, labourage, and rent, not only of the goods

then in the wharfinger's possession, but of such as had been delivered before the owner's insolvency, and which claim had been acquiesced in and paid by the insolvents, or the persons legally representing them; but that in other instances such claim for general lien had been made, and not acquiesced in, and the same has long been, and continues to be, a disputed point: but that the instances of acquiescence in the claim greatly preponderate. And it was further agreed, that the Court might draw such inference from these facts as a jury might have drawn.

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The question for the opinion of the Court is, whether, under the circumstances, the defendants have a general lien on the flax, and bags, and mats, now in their possession, for the amount of the charges denominated labourage and rent, due to them by *Forton*, at the time of his bankruptcy, or any part thereof. If the Court shall be of opinion that they have not such general lien, the verdict is to be entered for the plaintiffs, subject to the arrangement made between the parties. If the Court shall be of a contrary opinion, a nonsuit is to be entered.

F. Pollock, for the plaintiffs. The tender made by the assignees to the defendants, in respect of their claim upon the bankrupt, was sufficient in amount; for the defendants had no general lien upon the bankrupts' goods, beyond their charge for wharfage. The Courts have always taken a distinction between general and specific liens. When the real nature of that which is called a general lien is considered, the phrase will appear not to be a very correct one. A lien means a right to hold the goods of another, as a security for the payment of money due for labour and materials expended on those goods. A lien to that extent is a specific lien, a right founded in equity and reason, and as such has always been favoured by the Courts. But a lien going beyond that extent, that is a general lien, is more in the nature of a pledge, where one man pawns his goods to another as a security for all claims which that

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other has upon him ; which has always been regarded by the Courts with jealousy, and has always been required to be strictly proved. In *Rushforth v. Hadfield* (a), it seems to have been admitted, that a lien claimed for a general balance is not founded on the common law, but that such a lien may arise by contract ; and that usage of trade, if general, uniform, and long established, is evidence of such a contract. But it was decided there, that, as general liens are not to be favoured, the party who sets up such a claim ought to make out a very strong case ; and that evidence of a few recent instances of detainer of goods for a general balance, is not sufficient to furnish an inference, that the owner of the goods had knowledge of the usage, and so to warrant the conclusion, that he contracted with reference to it, and adopted the general lien into the particular contract. Then, as the claim made by these defendants is not to be favoured, but is to be strictly proved, and as usage (the only evidence in support of it) is only evidence of an agreement ; let this case be tried by that test. The case finds that the claim of general lien has long been, and continues to be, a disputed point in Hull ; that, in some instances, it has been acquiesced in, and in others not ; but that the instances of acquiescence greatly preponderate. Now that is not sufficient evidence of usage, even to be left to a jury, so as to raise the presumption of the bankrupt having agreed to adopt the general lien into his dealings with the defendants. There must be either an actual personal acquiescence in the claim by the party charged ; or, such a general, uniform, established, and notorious acquiescence in it by the trade, as fixes the party with a knowledge of the usage, and with the adoption of it into his own dealings. But there is neither of those in the present case. Every person dealing with a wharfinger has a right to make his own bargain with him : and the practice, even of the majority of persons in the same trade and neighbourhood, is not binding upon a par-

(a) 6 East, 519. 7 East, 224. And see 2 Smith 634, 7. 3 Smith, 221, S. C. Selw. N. P. 403, 1383, 7th Ed.

ticular individual. Here, the general lien for wharfage is not disputed; but labourage is part of wharfage, and then the charge for the one includes the other. But if that, like warehouse rent, is a distinct charge, a lien in respect of it cannot be supported, except by special agreement, or invariable usage; neither of which have been proved to exist in this case.

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Parke, contra. A wharfinger's general lien extends to all charges connected with his business as a wharfinger. The authorities in support of this position are very strong. In *Naylor v. Mangler* (a), it was contended, that a wharfinger had a lien for his general balance; and Lord *Kenyon* said, "the usage in the present case has been proved so often, that it must be considered as a settled point, that wharfingers have the lien contended for." In *Spears v. Hartly* (b), Lord *Eldon*, upon the authority of the preceding case, held, that a wharfinger had a lien for his general balance, and that, although the balance was of more than six years standing, the wharfinger might retain the goods by virtue of his general lien, for the debt was not discharged by the Statute of Limitations, but the remedy only. So in *Richardson v. Goss* (c), Lord *Alvanley* said, "the plaintiff tendered to the defendant the freight and charges on the goods in question, which the latter refused, contending, that by the custom of the trade, which is now become part of the contract between wharfingers and their customers, he was entitled to retain them for his general balance due from *Wilson* (the consignee of the goods). It is true, that as between the defendant and *Wilson*, if the former had received the goods on *Wilson*'s account, and as belonging to him, the defendant would have had a right so to retain them." There is quite enough stated upon the face of this case to shew that a general usage has prevailed in Hull, for wharfingers to have some lien upon the goods in their hands. It is found, undoubt-

(a) 1 Esp. 109.

(b) 3 Esp. 81.

(c) 3 B. & P. 119.

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edly, that whether that lien should or should not extend to labourage and warehouse-rent, has been a disputed point; but it is also found, that the instances of acquiescence in the lien to that extent have greatly preponderated, which shews that the claim of a lien to that extent must have been universally made. Then, as the claim has been universally made, and has in a great majority of instances been acquiesced in, there is evidence upon which a jury would have been warranted in finding, that there was a general usage in favour of the lien claimed by the defendants; and the case admits that the Court may draw the same inference from the facts found in it, as a jury might have drawn. It was held in *Rushforth v. Hadfield* (a), that the lien of a common carrier, for his general balance, might arise from an implied agreement, to be inferred from the general usage of trade; and the same rule applies to a wharfinger; for he is a species of carrier, having similar duties to perform in landing, weighing, and delivering the goods entrusted to his care; and entitled therefore, to enjoy similar privileges. The recent case of *Rex v. Humphery* (b), where a wharfinger set up a lien against the crown, goes the whole length of the present argument. It was there held, that "a wharfinger's general lien on the goods of his customer in his possession for his balance, in respect of freight and wharfage, due before the teste of an immediate extent, issued against such customer, being the crown's debtor, should prevail against the extent." It was doubted "whether, a wharfinger's lien for warehouse-room stood on the same footing;" but, "where a wharfinger detained goods on his premises, seized there under an immediate extent, in respect of a lien for wharfage, which was afterwards established; his claim for warehouse-room, from the teste of the extent till the forcible removal of the goods, was allowed." The claim for wharfage is admitted in this case, and there is no reason why the claim for

(a) 6 East, 519.

(b) 1 M'Clel. & You. 173.

labourage and warehouse-room should not stand upon the same footing. They are equally necessary to the preservation of the goods committed to the wharfinger's care, and equally form a part of his duty ; for the mere act of landing the goods upon his wharf, unless he afterwards housed them in his warehouses, and kept them there in good order, would be a very inadequate performance of his duty to the owner.

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BAYLEY, J.—Where a wharfinger sets up a claim of general lien, the onus is upon him to prove his claim distinctly. The usage of that particular trade may differ at different places. Where a general, continued, and undisputed usage in favour of the lien is clearly established, the inhabitants of the place, dealing with the wharfinger, must be presumed to know the usage, to acquiesce in it, and to adopt it into their dealings. But the acquiescence in the usage must be general ; a majority of instances is not sufficient to render it binding upon every individual. The wharfinger, living and carrying on business in a particular neighbourhood, is acquainted with the usage of trade there ; the *lex loci*, if I may use the term, is known to him ; and if any doubt or dispute arises about it, he has it in his own power to protect himself, by expressly stipulating that he will deal upon those terms, and no other. Usage is no more than evidence of an agreement to deal upon particular terms. In this case the wharfinger knew that the right to a general lien for labourage and warehouse-rent was a disputed point ; therefore it was his duty to communicate to every one of his customers, that he insisted upon his right to such a lien : and where he has not done so, he cannot set up the right. It appears that in Hull, where these parties resided, the instances of acquiescence in the general lien greatly preponderated ; but that is not enough : a man may acquiesce through ignorance, or, where the sum in dispute is small, he may prefer the sacrifice of the money to the inconvenience of a law suit. Upon

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the principle that no express agreement, and no universal usage, in favour of the defendants' claim, exists in this case, but that, on the contrary, they knew the point to be a disputed one, and therefore ought to have communicated to the bankrupt that they meant to insist upon the right, I am of opinion that they cannot now set up the right, and consequently, that the verdict must be entered for the plaintiffs.

HOLROYD, J.—I am of the same opinion. Nothing but an agreement, express, or implied, can entitle the defendants to the right which they claim. Usage may amount to an implied agreement, where it is generally acquiesced in; but in Hull, where these parties live, it has not been generally acquiesced in, but the right itself is a disputed point. Then, here there is no agreement, express or implied, in support of the lien, and therefore the defendants cannot insist upon it.

LITLEDALE, J.—I am also of the same opinion. There may be no doubt as to the wharfinger's right of general lien for wharfage, but that will by no means comprehend a lien for warehouse-room or labourage, without some agreement, express or implied. Here, so far from there being any agreement on the subject, it appears that the matter has long been, and still is, a disputed point. If the wharfinger's lien could be extended in the way now asked for, that of the carrier might with equal propriety be enlarged in the same degree; for he frequently acts in the capacity of a warehouseman.

Judgment for the Plaintiffs.

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TRESPASS for breaking and entering a certain close called the Garden, and other closes of plaintiff, and subverting and carrying away the soil. Plea, not guilty, and issue thereon. At the trial before *Burrough, J.*, the case was this:—The plaintiff and defendant both rented premises of the same landlord, a Mr. *Nicholas*. The defendant held his premises, which consisted of the entire farm and estate of Trenarth, except a dwelling-house, garden, lawn and field, under an unexpired lease for 21 years granted to his father by Mr. *Nicholas*. The plaintiff held his premises, consisting of the excepted parts of the Trenarth estate above mentioned, under a parol agreement with Mr. *Nicholas*. The defendant claimed as part of his premises, a lane which ran between a certain portion of his own premises and those of the plaintiff; and on one side of which was a ditch, which adjoined the plaintiff's garden; that lane was the only way to the defendant's dwelling-house and farm-yard, though it was admitted that the plaintiff had always enjoyed the liberty of passing along it to the back part of his house and offices. It was proved that the defendant, and his father before him, had exercised various acts of ownership over the lane for many years; cleansing the ditch, scraping the road, and collecting and carrying away the soil and muck so collected; and that on one occasion, the plaintiff applied to the defendant for permission to place a furze rick and a dung heap in the lane. The lease under which the defendant held was not produced, but its existence was proved. Mr. *Nicholas* being asked by the learned Judge to which of the parties he had let the lane, answered, "that he had let it jointly to them both, as much to one as to the other;" and thereupon the learned Judge, being of opinion that the plaintiff and defendant were tenants in common of the lane, or at least that the plaintiff had not such an exclusive possession of

Where, in trespass *quare clausum fregit*, it appeared that plaintiff and defendant, respectively, occupied lands, belonging to the same landlord, and abutting on different sides of a lane; and that the defendant held under a lease, which was not produced:—Held, that the declaration of the landlord, "that he had let the lane jointly to the plaintiff and the defendant, as much to one as to the other," was properly received in evidence; that being received, it proved the plaintiff and defendant to be tenants in common of the lane; and, consequently, that neither of them could maintain trespass against the other, in respect of the lane.

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it, as was necessary to entitle him to support trespass, refused to hear any further evidence, and directed a nonsuit. A rule nisi, for setting aside the nonsuit, and for a new trial, having afterwards been obtained,

Jeremy, now shewed cause. Unless the plaintiff had the exclusive possession of the *locus in quo*, he was not entitled to maintain an action of trespass in respect of it. The landlord proved that he had let the *locus in quo* "jointly, both to the plaintiff and the defendant, as much to one as to the other." The learned Judge was of opinion, that that was evidence that the plaintiff and the defendant were tenants in common of the *locus in quo*, or at least, that the plaintiff had not the exclusive possession of it, so as to be entitled to maintain the action. In that opinion the learned Judge was perfectly correct; the nonsuit, therefore, was right, and this rule must be discharged.

Halcomb, *contra*. The ditch was no part of the lane. It was on the side of the lane adjoining to the plaintiff's premises, and in fact, formed part of the plaintiff's premises; the plaintiff, therefore, was *prima facie* entitled to the soil of that half of the lane which lay nearest to his premises, and to maintain trespass in respect of it, *Stevens v. Whistler* (a); where it was held, that the plaintiff, having lands abutting on one side of a public highway, called *Shepherd's Lane*, (which was *prima facie* evidence that the nearest half of the lane was his soil and freehold), might declare generally for a trespass in his close, called *Shepherd's Lane*. Then there was nothing to rebut the *prima facie* evidence of the plaintiff's title; for the landlord's evidence, with respect to the nature of the holding of the parties, was clearly inadmissible; because, as the defendant was proved to hold under a lease which was in existence, that lease ought to have been produced. Upon both grounds, therefore, first, that the plaintiff had such a

(a) 11 East, 51.

possession of the *locus in quo* as entitled him to maintain trespass, and secondly, that the evidence of the landlord was improperly received, the nonsuit ought to be set aside, and a new trial granted.

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BAYLEY, J.—I am clearly of opinion, that the nonsuit directed by the learned Judge in this case was right. Where lands abutting on a ditch and a lane, on each side, belong to different owners, the presumption is, that a hedge and ditch on one side, both belong to the occupier of the land on that side. But that is not the fact here, therefore the presumption does not arise. Here the land on both sides belongs to the same owner, and he may let it in whatever manner he pleases. It was for the plaintiff to shew that the ditch and the lane, in which he complained of a trespass having been committed, belonged exclusively to him. The ditch and the lane, and the land on each side of them, belonged to Mr. *Nicholas*. It was in his power, if he chose, to let the lane jointly to the plaintiff and the defendant, and he proved that he had in fact done so. It is said his evidence was inadmissible, because the defendant's lease ought to have been produced. But it was no part of the defendant's duty to produce his lease, and to shew what and how he held; it was for the plaintiff to shew what and how *he* held: and as he did not call for the lease, and did call Mr. *Nicholas*, that person's evidence was clearly admissible to shew the real nature of the plaintiff's holding. When his evidence was given, it was plain, that neither the plaintiff or the defendant had the exclusive possession of the lane, but that they were tenants in common of it; and then it followed, that neither of them could maintain an action of *trespass* against the other, in respect of the lane.

HOLROYD, J., and LITLEDAL, J., concurred.

Rule discharged.

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A power of attorney "for me, and on my behalf, to pay and accept such bills of exchange as shall be drawn or charged on me, by my agents or correspondents, as occasion shall require;" authorizes the attorney to accept such bills only as are drawn upon the principal by his agents or correspondents, in that character, and in respect of the private transactions, and on the individual account, of the principal.

A power of attorney to pay and receive money, buy and sell lands, bring and defend actions, give and take releases, indorse and negotiate bills of exchange payable to the principal, and generally to perform all other affairs and concerns of the principal; does not authorize the attorney to accept bills drawn on the principal.

ASSUMPSIT, by the plaintiffs as indorsees, against the defendant as acceptor, of a bill of exchange. Plea, non assumpsit, and issue thereon. At the trial before *Abbott*, C. J., at the London adjourned Sittings after *Michaelmas* term, 1823, the plaintiffs had a verdict, damages 1,833l.; subject to the opinion of the Court upon the following case:

The plaintiffs are bankers, carrying on business in London. The defendant was a merchant, engaged in extensive mercantile business, and also in joint speculations to a considerable amount with *Thomas Burleigh*, Messrs. *Bridges* and *Elmer*, *Samuel Howlett*, and *William Rothery*. In the year 1815, the defendant went abroad on the partnership business, and remained abroad till after the bill, upon which the action was brought, became due. While the defendant continued abroad, he executed two powers of attorney, of which the following are copies:

"I, *G. G. H. Munnings*, do make, &c., and in my stead put, &c., *William Rothery*, *Thomas Burleigh*, and *Sally Munnings*, my wife, to be jointly, and either or any of them severally, my true and lawful attorney or attorneys, for me, and in my name, and to my use, to ask, demand, collect, get in, sue for, recover and receive, of and from all companies, corporations, and bodies politic, and all and every person and persons soever in Europe, whom these presents, and the matters and things herein contained do, shall, or may concern, all such sums of money, goods, wares, merchandizes, effects, properties, chattels, ships and vessels, with their appurtenances, debts, claims, and demands whatsoever, as now are, or hereafter shall become,

and generally to perform all other affairs and concerns of the principal; does not authorize the attorney to accept bills drawn on the principal.

accrue, and grow due, owing, and payable, or deliverable, and as do and shall appertain and belong unto me, upon or by virtue of any securities or security, whether of a specialty or simple contract nature, deeds, charter parties, bonds, bills of exchange, promissory notes, bills of lading, or policies of insurance, or as or for the purchase prices of any houses, lands or tenements, ships or vessels, goods, wares, or merchandizes, or of any other things whatsoever, or for or by reason or account of merchandizing, trading, or dealing, or upon any other account, or in any other way or manner whatsoever or howsoever; or upon non-payment or non-delivery thereof, or of any of them, or any part thereof, for me, in my name, and on my behalf, to have, use, and take all such lawful ways, means and proceedings, both at law and in equity, as shall be requisite or expedient, and advisable to enforce, compel, recover and retain payment and delivery of, or satisfaction for the same, and every part and parcel thereof, and for such purposes to institute, commence, and bring against all or any of the companies, &c., and persons aforesaid, all such actions and suits; and to sue, or cause to be sued forth, all such arrestments, attachments, sequestrations, and other proceedings, as shall be needful and advisable in the premises; and such actions, &c., and other proceedings, to prosecute to final judgment, decree, and execution, or otherwise conclude or terminate, as the nature and circumstances of the case may require, or they, the said attorneys, any or either of them, shall deem fit and proper. And also for me, and in my name and behalf, to appear to, withstand, defend, defeat, and overthrow, all such actions and suits as shall be instituted and commenced against me in any court or courts whatsoever, in Europe: and also to make up, adjust, liquidate, and finally settle all accounts and matters of account depending, and that shall be in dependence, between me and any other person or persons whatsoever, and the same accounts to close and subscribe, so as to authenticate the passing thereof, as the case may require, and to receive or

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pay the balance of the accounts respectively. And also for me, and in my name and behalf, to submit and refer any dispute or difference which may arise concerning any of my affairs, concerns, or dealings, or any matter or thing connected therewith, unto the award and determination of such arbitrator or arbitrators, or umpire, as my said attorneys shall approve of; and thereupon to execute such bonds of arbitration and deeds of reference as shall be requisite, to consent and agree that such submission may be made a rule of any court or courts, to enforce the fulfilment of any award or awards by the opposite party or parties, or fulfil such award on my part; or if partial and unjust to oppose, contest, and set aside the same. And also upon payment and receipt or delivery of the sums of money, goods, &c. aforesaid, that are or shall be due, owing, and belonging, or shall be awarded unto me, or any of them, or any part thereof, for me, and in my name, and as my acts and deeds, to sign, seal, and deliver all such receipts, releases, acquittances and discharges, deeds and instruments, as shall be necessary; and if need be, to enter satisfaction on the record or records of any judgment or other proceeding which shall have been had or obtained for the recovery thereof, and even, if it shall seem most for my interest, to accept and take part for the whole of any such debts, &c. as aforesaid, or such composition, dividend, or share of any insolvent debtors' or bankrupts' estates, as can or may be had or gotten for the same, and thereon the same wholly to acquit, release, and discharge, or otherwise, as may seem most advisable. And also for me, and in my name, to indorse, negotiate, and discount, or acquit and discharge, the bills of exchange, promissory notes, or other negotiable securities, which are or shall be payable to me, and shall need and require my indorsement. And also for me, and in my name, to sell and dispose of my ship or vessel, called the Melantho, and all or any such ships or vessels, or parts or shares of ships or vessels, as I now am, or hereafter shall

or may be entitled unto, or interested in, unto such person or persons, and for such price or prices, as my said attorneys shall think fit and adequate; and upon such sales or sale, for me, and in my name, and as my acts and deeds, to sign, seal, execute, and deliver all such bills of sale, deeds, devices, conveyances, and assurances in the law, as shall be requisite and sufficient to convey and assure such ships or vessels, or parts or shares, &c., with all and singular the premises and appurtenances thereunto belonging, unto such purchaser or purchasers thereof, his or their executors, &c., for ever; and for me, and in my name, to indorse, sign, and subscribe all such memorandums and indorsements of transfer on the certificates of registry of such last-mentioned ships or vessels respectively, and to do all other such acts whatsoever as shall be necessary and sufficient for completing and confirming such sales and transfers. And also for me, either solely; or jointly with the other owners, as the case may be, to let to freight such ships or vessels as I now am, or hereafter shall or may be, interested in or entitled unto, unto such person or persons, for such voyages and services, and at such rates of freight, as may be deemed sufficient, and most to my interest. And also for me, and in my name, to hire and take to freight any ships or vessels, upon such voyages and adventures, and at such rates of freight, and upon such terms and conditions, as may be judged most for my interest, and for me, and in my name, and as my acts and deeds, to execute and deliver all charter-parties of affreightment, or other instruments, which shall, in either of the cases last mentioned, be necessary to be executed by me. And also for me, and in my name, and on my behalf, to make and effect, and cause to be made and effected, insurance on all or any ships, vessels, goods, wares or merchandises, which belong unto, or to be shipped or consigned by me, at such rates of premium as may be reasonable, and to pay such premiums on my account. And also for me, and in my name, and for my account and risk, to buy,

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sell, barter, exchange, export, and import all goods, &c., and to trade in and deal in and with the same, in such manner as shall be deemed and considered most for my interest. And generally for me, and in my name, place, and stead, and as my act and deed, or otherwise, but to my use, to make, do, execute, transact, perform and accomplish, all and singular such further and other acts, deeds, matters, and things as shall be requisite, expedient, and advisable to be done, in and about the premises, and all other my affairs and concerns, and as I might or could do if personally acting therein, hereby, for the purposes aforesaid, giving and granting my full and whole power and authority in all and singular the matters aforesaid to the said *W. R.*, *T. B.*, and *S. M.*, jointly and severally.—
Cape Town, 18th May, 1816."

"I, *G. G. H. Munnings*, do make, &c., and in my stead put, &c., *Sally Munnings*, my wife, my true and lawful attorney, for me, and in my name, and on my account, to enter into and upon, and take possession of, all and singular the honors, manors, messuages, farms, lands, tithes and hereditaments, freehold, copyhold, and leasehold, whatsoever and wheresoever, to me belonging, or in any wise appertaining, or wherein or whereof I have any estate or inheritance, and to make sale of, or convey in exchange for other freehold, copyhold, or leasehold estates, any of my said freehold, copyhold, or leasehold estates, and particularly to make sale of three copyhold cottages, situate, &c., and also of the wharfs and premises, situate, &c., also of the estate at present inhabited by the said *S. M.*, and the lands thereunto belonging, also of the great tithes of, &c., and also of the lease of a farm called, &c.; and the money arising from such sales, or on account of any exchange, to lay out and invest in other lands, &c., or on government or real securities, or otherwise, as she shall think fit; and to sign, seal, and execute, and as my acts and deeds to deliver, any deeds, conveyances, and assurances for conveying, either by way of absolute sale, or in

exchange for other freehold, copyhold, or leasehold estates of any of my said freehold, leasehold, or copyhold estates, the which may be sold or exchanged, and to sign receipts for the consideration money on such sales or exchanges, and also to transpose or transfer any mortgages, or other securities, which she may take for any moneys which, from time to time, may have arisen from such sales or exchanges, and may have been placed out on such securities, and also to view, search, and see the state, condition, and defects of the reparation of all the said estates, and forthwith to give proper notices and directions for repairing the same, and generally to oversee, set, let, manage, and improve the said estates to the best advantage. And also, from time to time, to fell or cut down any wood, or underwoods, timber, or other trees, standing or being on any of my said lands, &c., which I have power to cut down, as my said attorney shall see fit, and to sell and dispose of, or allow for repairs, or otherwise, in or about the said premises, and generally to repair and uphold, or take down and rebuild all or any houses, &c., in and upon the said lands, &c., as occasion shall require, or do any other act and thing for the improvement of the same. And also to pay all taxes, &c., and all other payments whatsoever, due and payable for, or on account of, the houses, &c., and other the premises, of my estate ; and also to contract with any persons for leasing any of the said premises, and to set fines for new leases, and to accept surrenders of leases, and for that purpose, for me, and in my name, and as my act and deed, to make, &c., any leases, demises, or grants, or other lawful deeds, or instruments whatsoever, which shall be necessary and proper in that behalf. And also for me, and in my name, to ask, receive, and recover, of all the stewards, bailiffs, receivers, farmers, tenants, and all other occupiers whatsoever of all and every my said lands, &c., all rents, arrears of rent, services, issues, profits, emoluments, and sums of money, due, owing, and payable, or at any time hereafter

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to grow and become due, &c., for, or in respect, or on account of the same premises. And also to take all accounts from any persons whatsoever that have, or shall have, any dealings or transactions with me. And also for me, and in my name, and on my account, to sign my name, and affix my seal, and in due form of law to deliver any other deeds, conveyances, &c., either as trustee or otherwise, as need or occasion may be or require. And also for me, and in my name, during such continuance abroad, to demand, levy, sue for, recover, and receive, by all lawful ways and means whatsoever, of and from all persons whom it doth, shall, or may concern, as well all and every such sum and sums which are now due and owing to me, or which shall or may become and grow due and payable to me, and in default of payment thereof, to have, use, and take all lawful ways and means, and in my name, and otherwise for recovery thereof, by suit, action, plaint, attachment, arrest, or otherwise, and to compromise, or take less than the whole thereof, or otherwise to agree for the same, and, on receiving thereof, acquittances or other sufficient discharges for the same, to make, &c. And also for me, and by the like ways and means, and during my said continuance abroad, to receive as well all sums of money which shall and may become and grow due and payable to me, by and upon all bills of exchange which shall or may be remitted or sent to England for me, or on my account, and such bills to indorse, if necessary, in my name and on my behalf, and also all sums of money which are and shall become and grow due and payable to me, for or upon account of any act or acts of parliament, or for any dividend or dividends for or in respect of any stock belonging to me. And likewise for me, and in my name, but to and for my use, to demand, &c., all such other debts, dues, sums of money, goods, &c., which now are, or which shall and may hereafter become and grow due, owing, payable, or belonging to me, upon any bonds, bills, notes, or other securities. And also for me, and on my behalf, to pay and

accept such bills, notes, or other securities. And also for me, and on my behalf, to pay and accept such bill or bills of exchange as shall be drawn or charged on me by my agents or correspondents, as occasion shall require. And also for me, and on my account, to receive all sums of money now due or payable to me, for or in respect of any legacy, testamentary bequest, or appointment, or otherwise howsoever, and all sums of money which I am now, or hereafter, during my residence abroad, may become entitled to receive as next of kin to any person or persons whatsoever. And generally to do, negotiate, and transact my affairs and business during my absence, as fully and effectually as if I were present and acting therein ; and upon receipt or recovery of all or any such sum or sums of money, annuities, dividends, debts, dues, goods, effects, bequests, and other things, or any of them, or any part thereof, receipts, acquittals, and other sufficient discharges for the same to make, sign, seal, and execute, for me, and in my name.—23d July, 1817.”

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Thomas Burleigh, the drawer of the bill of exchange in question, corresponded with the defendant, and acted as his agent, both before and after the receipt of the power of attorney of 23d July, 1817. The defendant, while abroad, employed part of the produce of the joint speculations in his individual concerns. During the absence of the defendant, *Thomas Burleigh*, for the purpose of raising money to pay to creditors of the joint concern, who were become urgent, drew four bills of exchange for 500*l.* each, upon the defendant, dated 22d May, 1819. The proceeds of the said four bills were applied in payment of partnership debts. They were accepted by the defendant by procuration of his wife. The bill in question was afterwards drawn and accepted in order to raise money to take up the bills before-mentioned. The following is a copy of the bill :—

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" 1,560l.

July 23.

London, 30th January, 1820.

Six months after date, pay to my order one thousand five hundred and sixty pounds, for value received.

Thomas Burleigh."

" To Mr. G. G. H. Munnings,
 172, Bishopsgate-street."

The acceptance was in these words: " At *Esdaile & Co.*, by procuration of *G. G. H. Munnings, S. Munnings.*"

The bill in question was discounted by the plaintiffs. The defendant returned to England in October, 1821. He, and each of the partners to the joint speculations, claimed to be a creditor on the joint concern.

The question for the opinion of the Court is, whether, under either of the powers of attorney, the defendant's wife was authorized to accept bills drawn by *Thomas Burleigh*, to raise money to discharge debts, owing by the partners in the joint concern.

Parke for the plaintiffs. The question in this case depends entirely upon the construction of the powers of attorney, and upon their binding effect on the defendant, with respect to third persons; and it is submitted, on the part of the plaintiffs, that *Mrs. Munnings* had authority to accept the bill in question under both, or either of the powers of attorney; and it will perhaps be most convenient to consider the second, in point of order, first. By the second power, the acceptance of this bill is *expressly* authorized, for the defendant there empowers his wife, " for me and in my behalf, to pay and accept such bill or bills of exchange as shall be drawn or charged on me by my agents or correspondents, as occasion shall require." That the bill in question was drawn on the defendant, by an agent and correspondent of his, is specifically stated in the case; so that the only question really is, whether *occasion required* that such a bill should be drawn and accepted.

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Now, in the first place, that point cannot affect the rights and interests of third persons, the *bonâ fide* holders of the bill. The plaintiffs are bankers; they have discounted the bill in that character, in the fair and ordinary course of business, supposing that the attorney had authority to do that which she assumed to do; and whatever may be the effect of a stipulation like this upon *her*, it ought not to have any operation upon *them*; for it must be considered as merely directory to the attorney, giving her a discretionary power, which once exercised, cannot be invalidated. There are authorities for saying that a power of attorney, such as this, ought to receive a more liberal and extended construction, with reference to third persons, than the courts would give it, with reference to the parties themselves. In *Howard v. Baillie (a)*, it was said by the Court, when alluding to this very point, "Our books say, that these kind of authorities are to be pursued strictly; they instance, that an authority given to three, cannot be executed by a less number than the whole; and the statute of 21 Hen. 8, c. 4, was thought necessary to be made, to remedy the inconvenience arising from it, in the case of executors, where some have declined to act: but our books also say, that they are to be so construed as to include all the necessary means of executing them with effect: thus an authority to receive and recover debts includes a power to arrest." And again, "this direction to pay, in a course of administration, may operate as between her (the executrix granting the power of attorney) and her attorneys; but as against creditors receiving payment of their debts, it can have no operation." That language applies forcibly to the present case. This power of attorney ought to be read as if the words, "at the discretion of my attorney," were inserted, for that is the obvious meaning of the clause. The stipulation here is not, to accept "if it shall be necessary," but "as occasion shall require," words of great latitude, involving the question both of necessity and of

(a) 2 H. B. 618.

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expediency, and leaving, most clearly, both those questions to the discretion of the attorney. How is it possible for third persons, in the situation of these plaintiffs, to ascertain the fact of the expediency of the attorney's accepting this bill? But the attorney herself could judge of the expediency of the measure, and her discretion was guard enough for her principal, but was no guard at all for third persons discounting the bill, unless the principal is bound by his attorney's act. In the case of an agent acting under a special limited authority, he is bound to confine himself within the scope of his authority, and cannot bind his principal beyond it; as where a broker is authorized to purchase one particular specified kind of silk, and he buys another, his principal is not bound. *The East India Company v. Hensley* (a); but where the authority is general and unlimited, and coupled with a discretionary power to act as occasion shall require, the principal is bound by whatever the agent does, in the fair exercise of his discretion. Here the authority is general and unlimited, and is coupled with a discretionary power to act as occasion shall require, extending to all the circumstances of the bills that the agent may accept; for the power is not to accept bills "drawn on me by my agents or correspondents, on my own individual account," but generally "drawn on me by my agents or correspondents, as occasion shall require." Then, secondly, occasion did require that the bill in question should be drawn on the defendant, and should be accepted on his account by his attorney; and that is sufficiently apparent on the face of the case. The defendant was concerned in mercantile transactions both singly, and jointly with others. He had appropriated part of the produce of his joint transactions to his own individual concerns. The joint concern was in debt; the joint creditors were become urgent for the payment of their claims: and this bill was drawn for the purpose of paying those claims. Most clearly, occasion required that a man so situated

(a) 1 Esp. N. P. C. 111.

should contribute to the payment of the joint debts of a partnership, of which he was one; and if so, occasion required that this bill should be drawn for that purpose; and, being so drawn, occasion equally required that it should be accepted and paid. It is impossible to infer with certainty, from the language of this power, that it was intended to be confined to bills drawn on the defendant in respect of his own private concerns, and on his own individual account. The most that can be said is, that the language of the power is ambiguous, and it would be extremely unjust that third persons should be prejudiced by that ambiguity; in such a case, the general rule of construction ought to be adhered to, namely, that the words of the party are to be construed most strictly against himself. Then, with respect to the first power of attorney, or rather with respect to both of them, the general terms are sufficient, independently of the special clause already noticed, to clothe Mrs. *Munnings* with authority to accept the bill in question. It was held in *Hay v. Goldsmidt* (a), that where one gave a power of attorney to another, to demand and receive all moneys due to him, on any account whatsoever, and to use all means for the recovery thereof, and to appoint attorneys for the purpose of bringing actions, and to revoke the same, "*and to do all other business*;" the latter words must be understood with reference to the former, as meaning all business appertaining thereto: and that although the attorney might receive moneys due to the principal in *auter droit*, yet he could not, under that power, indorse a bill for him which had come into his hands. That case was cited with approbation by *Lawrence, J.*; and acted upon by the Court, in *Hogg v. Snaith* (b); and the principle of it cannot be denied; namely, that where there is first a special and limited power, *to receive money*, a subsequent general power *to do all other business*, cannot enlarge the first power. But the same principle will apply here; and as there is here first a general and

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(a) 2 Smith's Rep. 79.

(b) 1 Taunt. 347.

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unlimited power to conduct all the principal's affairs as fully and effectually as he himself could do, that cannot be restrained by a subsequent special power to accept bills, or to do any particular act. Looking at the general powers given by both these instruments, it is clear that it was the intention of the defendant to constitute his wife his general attorney; and if so, it must also have been his intention to authorize her to accept such bills as the bill in question. Upon both grounds, therefore, first that the special power in the second instrument, expressly authorized Mrs. *Munnings* to accept this bill, and secondly, that the general powers in both the instruments, impliedly gave her that authority, it is submitted, that the defendant is bound by her act, and is liable to the plaintiffs in this action.

F. Pollock, contra, was stopped by the Court.

BAYLEY, J.—This is a case in which the indorsee of a bill of exchange has sued the acceptor, knowing that the bill was accepted by procuration. Whoever takes a bill accepted by procuration, knows that he has not the security of the acceptor himself, but only that of a third person, who claims to have authority from the acceptor to give his security. He takes the bill, therefore, at his own peril. If the bill turns out to have been accepted without authority, the holder is not without remedy; but his remedy is against the party from whom he received it, and not against the person for whom it purports to be accepted. And this is but reasonable; for in such cases it is the duty of the person who discounts the bill to inquire into the authority of the attorney, to ascertain its nature and extent, and to see whether it includes the power which the attorney assumes. In this case, the plaintiffs knew that the bill was accepted by an agent, and it was their duty to make the inquiries I have mentioned. Then with respect to the construction of the powers of attorney. The

general rule is, that powers of attorney are to be construed strictly; and in all cases they are to be examined carefully, in order to see whether the act done by the attorney is fairly within the scope of the authority given by the principal. The words, "for me, and in my name, and in my behalf," or, "on my account," pervade both these powers of attorney throughout. Generally speaking, those expressions would confine the authority of the agent to the separate individual concerns of the principal. In some instances they may be consistent with the extension of the agent's authority to partnership transactions, in which the principal is a sharer; but that can only be where the other partners are acting in the particular transaction in respect of which the agent exercises the authority, jointly with the principal: and that is not the case here. Looking at these instruments throughout, the object and intent of them seems clearly to be, to give the attorney a power to receive, rather than to disburse, money; a power to do acts for the increasing and discharging the principal's estate, rather than for the diminishing or encumbering it. It is observable that the first of them does not contain any express power to accept bills, and that the second does; from which it must be inferred, that at the time when the first was made, it was not the intention of the defendant to give his attorney such a power. Then what is the express power contained in the second of these instruments? It is, "for *me*, and on *my* behalf, to pay and accept such bill or bills of exchange as shall be drawn or charged on *me*, by *my* agents or correspondents, *as occasion shall require*." It seems to me impossible to doubt, from the very guarded language here used, that the power of accepting bills there given was intended to be confined to bills drawn on the defendant on his own private account, and in respect of his own individual transactions; for the words do not appear to me to be capable of any other interpretation. The defendant seems carefully to have limited the power to such bills as it was right and proper that he, and he only,

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should accept and pay; and if so, it would be defeating his main object to extend it to bills drawn in respect of joint speculations and partnership transactions, in respect of which he had only a joint liability with others. Then, they are to be bills drawn by the defendant's agents or correspondents. That must mean, bills drawn by his agents or correspondents, in their character of agent or correspondent; which the bill in question was not. Then lastly, all this is to be done as occasion shall require. It has been argued that by that expression the defendant invested his attorney with a discretionary power to accept or not, as she thought proper; and that she having exercised that discretionary power, by accepting this bill, he is bound by her act, and the plaintiffs, as third persons, cannot be affected by the manner in which her discretion has been exercised. I do not understand those words as investing the attorney with any discretionary power, but, on the contrary, as cautioning her to exercise her authority in those cases only where occasion really required her to do so. But, in either view of the case, the plaintiffs must take the consequences of the attorney's outstepping her authority on the one hand, or erroneously exercising her discretion on the other, for they took the bill at their own peril, and ought to have demanded a sight of the power of attorney, and a statement of all the circumstances under which the bill was drawn, before they discounted it (a). Then, did occasion require that this bill should be drawn upon the defendant, and accepted on his behalf? I think clearly not. What occasion could require that the burthen of all the joint debts of a partnership should be thrown upon one of the partners? None. In every view of the case then, it seems to me, that Mrs. *Munnings* had no authority to accept this bill, and consequently that the plaintiffs have no right of action upon it,

(a) And see *Fenn v. Harrison*, J. B. Moore, 583. 8 Taunt. 532, 3 T. R. 757. *Whitehead v. Tuckett*, S. C. *Murray v. East India Company*, 5 B. & A. 204. *Leyton v. Sneyd*, 2

as against the defendant. I am, therefore, of opinion, that a nonsuit must be entered.

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HOLROYD, J.—I entirely agree with my brother *Bayley*, in the construction which he has put upon these powers of attorney. The case does not find that the bill in question was drawn by *Burleigh*, in the character of agent or correspondent of the defendant, or even that he was such agent or correspondent at the time when he drew the bill; it finds only, that *Burleigh* corresponded with the defendant, and acted as his agent both before and after the receipt of the second power of attorney. It must be taken, therefore, that *Burleigh* did not draw the bill, as the defendant's agent; and then, it was clearly not such a bill as the attorney was authorized to accept. Besides, the case does find that *Burleigh* drew the bill for the purpose of raising money to pay the creditors of a partnership concern, in which he was himself a partner; so that instead of acting as an agent, he was acting as a partner, and under an interest to relieve himself from liability, at the expense of the defendant.

LITLEDALE, J., concurred.

Judgment of Nonsuit.

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TRESPASS, for breaking and entering the plaintiff's close. Pleas, not guilty, and a public right of way over
 Section 86 of the General Turnpike Act, 3 G. 4, c. 126,
 enacts, that "After any new road shall be completed, the lands or grounds constituting any former roads or road, or so much and such part or parts thereof, as in the judgment of the trustees may thereby become useless or unnecessary, shall and may be stopped up and discontinued as public highways, *unless* leading to some church, mill, village, town or place, lands or tenements, to which such new road does not immediately lead, and which may therefore be *deemed proper* to be kept open, either as a public or private way or ways, for the use of any inhabitant at large, or any individual or individuals:"—Held, that the exception does not oust the trustees of jurisdiction in the cases therein mentioned, but leaves them a discretionary power; that they might stop up and dis-

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the *locus in quo*. Issue thereon. At the trial before *Burrough, J.*, at the Berkshire Summer Assizes, 1826, a verdict was found for the plaintiff with nominal damages, subject to the opinion of the Court upon a case, the substance of which was as follows.

The *locus in quo* had formed part of a turnpike road leading out of the public Bath road, in the parish of Englefield, between Reading and Speenhamland, to Pangbourn, in the county of Berks. The lower part of the road led from the Bath road to the village of Englefield, and the upper part from the same village, towards Pangbourn, both passing through the lands of the plaintiff, with the exception of a part, and extended in length, from the Bath road at the south corner of Bostock-lane, where it cuts the road leading from the Bath road towards Bradfield, and from that road to the point at which it cuts the road leading from Bradfield, by Englefield church, towards Theale.

By a local act of 11 *Geo. 3*, intituled "An Act to continue and render more effectual several Acts for repairing the highways between the Bear Inn, in Reading, and Puntfield, in the County of Berks, and other roads in the said Acts mentioned, and for repairing several other roads in this Act mentioned;" and by another local act of 34 *Geo. 3*, intituled "An Act for enlarging the term and powers of an Act of 11 *Geo. 3*, for repairing," &c.; and by another local act of 55 *Geo. 3*, intituled, "An Act to continue the term, and amend and enlarge the powers of two Acts for repairing," &c.; the several powers of those acts relating to the repairing, widening, turning, or altering the said road, so leading out of the Bath road to Pangbourn, were vested in the trustees or commissioners hereinafter mentioned.

continue as a highway, and give up to the owner of the adjoining lands, an old road leading to a church, &c., to which the new road did not immediately lead; and that the person to whom the old road was so given up might maintain trespass against a party afterwards using the old road.

Seemle, that the proper remedy against such act of the trustees, is by appeal to the sessions, under 4 *Geo. 4*, c. 95, s. 87, which is incorporated with 3 *Geo. 4*, c. 126.

In the year 1822, the plaintiff applied to these trustees to alter the said road, so leading out of the Bath road to Pangbourn. On the 7th October, 1822, a committee of three trustees was appointed to view the proposed alteration, and having reported in its favour, a new line of turnpike road, leading out of the Bath road to Hogmore coppice, was formed, at the plaintiff's expense, and over his land. On the 25th April, 1825, the committee reported to the trustees, that having viewed the new road so made by the plaintiff, they considered it expedient that the old road (comprised in the *locus in quo*, as before described), should be stopped up, the new one being in a fit state for the use of the public; and it was therefore ordered by the trustees on the same day (sixteen trustees being present), that such parts of the old road as were to be given up to the plaintiff should be stopped up; and that order was immediately acted upon, by stopping up the old road, and affixing notices that it was so stopped up at each of its extremities.

At a meeting of the said trustees, held in January, 1826, notice of an intention to revoke, at a subsequent general meeting, the order of 25th April, 1825, was given by three of the trustees, and notices of the subsequent general meeting of the said trustees, to be held for the purpose of such revocation, signed by two of the trustees, were affixed on all the turnpike gates on the said road, 21 days before the said subsequent general meeting. On the 6th February, 1826, a general meeting of the said trustees was held, at which seventeen trustees were present, and it was ordered, that so much of the old turnpike road leading from the south end of Bostock-lane towards Hogmore coppice, as lies between the point at which the said old turnpike road touches the road leading from Reading towards Speenhamland, and the point at which the said old turnpike road touches the road leading from the said Reading and Speenhamland roads towards Bradfield, and containing in length 4 furlongs, 29 poles, and 3 yards, or thereabouts; and so much of the said old turnpike road as lies between

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the point at which the same road touches the said before-mentioned road leading towards Bradfield, and the point at which the said old turnpike road touches the road leading by the parish church of Englefield towards Theale, and containing, in length, 3 furlongs and 10 poles, or thereabouts; and also so much of the said old turnpike road as lies between the point at which the same road touches the road leading from the said parish church of Englefield, towards North-street, and the point at which the new line of turnpike road crosses the said old turnpike road, and containing, in length, 7 furlongs and 6 poles, or thereabouts; should be stopped up and wholly discontinued to be used as a road or highway, and that notice boards to that effect should be provided and affixed at the above-mentioned extremities of the same; and that the same several pieces of old turnpike road, thereby ordered to be stopped up, should be forthwith given up to the plaintiff.

On the 7th February, 1826, the trustees caused notices to be affixed to posts at the extremities, and at four intermediate points of the *locus in quo*, and barriers to be placed across the road, and trenches to be cut, at the above-mentioned points. On the 9th March, 1826, possession of the parts of the old road, described in the order of 6th February, 1826, was delivered to the plaintiff by the clerk of the trustees. The next quarter sessions of the peace for the county of Berks. were held on the 4th April, 1826, but no appeal against the order of the said trustees was made, entered, or heard at such quarter sessions. The defendants, contending that the right of way was not destroyed, on the 16th May, 1826, committed the acts alleged to be trespasses.

The old road, from the fir-tree in the Bath road, south end of Bostock-lane, to Hogmore coppice, contained 4,177 yards, or 2 miles, 2 furlongs, 39 poles, and 3 yards; the new road, between the same points, contains 3,970 yards, or 2 miles, 2 furlongs, and 3 poles, being less in distance by 36 poles and 3 yards. From Bostock-lane end to the

parish church of Englefield, by the road now stopped up, and passing toward Bradfield, and on which trespasses were committed, the distance was 2,606 yards, which now, by the nearest way, is 3,231; and the difference, as affecting the parsonage-house and village of Englefield, is the same. The distance from Englefield to Pangbourn is increased, by the alteration, 77 yards. On the road leading to Beenham, within the parish of Englefield, are several dwelling-houses, the distance from which to the parish church of Englefield, was 1,562 yards, before the alteration, and now is 2,816. On the Beenham road, and within the parish of Englefield, are certain premises, and a considerable quantity of land, held by the corporation of Reading, in trust, for charitable purposes. The defendants are owners and occupiers of premises in the village of Englefield. On the Bath road, at the distance of about a mile from the end of Bostock-lane, in the direction of Bath, is a mill, called Tile Mill, where the inhabitants of Englefield have always hitherto been accustomed to grind their corn, from which mill there is immediate water-carriage, the distance of which from the house of the defendant, *Welch*, is increased 625 yards by the alteration.

The question for the opinion of the Court is, whether, under the provisions of the statutes 3 *Geo.* 4, c. 126, and 4 *Geo.* 4, c. 95, and particularly under those contained in 3 *Geo.* 4, c. 126, ss. 83, 86, and 88, and in 4 *Geo.* 4, c. 95, s. 87 (a), the plaintiff is entitled to support his action of

(a) By 3 *Geo.* 4, c. 126, s. 83, it is enacted, that it shall be lawful for the trustees or commissioners of every turnpike road, and they are thereby fully authorized and empowered, from time to time, to make, divert, shorten, vary, alter, and improve the course, or path of any of the respective roads under their care and management, or of any part or parts thereof, and to divert, shorten, vary, alter,

and improve the course or path of any of the said several and respective roads, through or over any commons or waste grounds or uncultivated lands, without making satisfaction for the same; and also, through or over any private lands, tenements, or hereditaments, tendering and making satisfaction to the owners thereof, and persons interested therein, for the damage they shall sustain thereby.

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trespass against the defendants. If the Court shall be of opinion that the plaintiff can maintain such action, the

S. 86, enacts, that after any new road shall be completed, the lands or grounds constituting any former roads or road, or so much and such part or parts thereof, as in the judgment of the said trustees or commissioners may thereby become useless or unnecessary, *or shall or may (a) be stopped up and discontinued as public highways*, (unless leading over some moor, heath, common, uncultivated land or waste ground, or to some church, mill, village, town or place, lands or tenements, to which such new road or roads doth not, or do not immediately lead, and which may therefore be deemed proper to be kept open, either as a public or private way or ways, for the use of any inhabitant at large, or any individual or individuals), and shall be vested in, and shall and may be sold, and conveyed by the said trustees or commissioners, in the manner hereinbefore mentioned, for the best price that can be gotten for the same; and the money arising by such sale shall be applied for the purposes of the act, for repairing and maintaining such turnpike road.

S. 88, enacts, that where any turnpike road shall be diverted or turned, and the new road shall be made and completed, such new road shall be in lieu of the old road, and shall be subject to all the provisions and regulations in any act of parliament contained, or otherwise, to which the old road

was subject, and shall be deemed and taken to be a common highway, and shall be repaired and maintained as such; and the old road shall be stopped up, and the land and soil thereof shall be sold by the trustees or commissioners to some person or persons whose lands adjoin thereto, as hereinafter mentioned with regard to pieces of ground not wanted; but if such old road shall lead to any lands, house, or place, which cannot, in the opinion of the said trustees or commissioners, be conveniently accommodated with a passage from such new road, which they are hereby authorized to order and lay out if they find it necessary, then and in such case, the old road shall be sold, but subject to the right of way and passage to such lands, house, or place, respectively, according to the ancient usage in that respect.

By 4 Geo. 4, c. 95, s. 87, it is enacted, that if any person shall think himself aggrieved by any order, judgment, or determination made, or by any matter or thing done, by any trustees or commissioners of any turnpike road, in pursuance of this act, or the said recited act, (3 Geo. 4, c. 126), or any local act for making, repairing, or maintaining any turnpike road, (except where the order, &c. of such trustees or commissioners are hereby declared to be final and conclusive, and except under the particular circumstances herein-

(a) This is clearly an erroneous expression, the legislature undoubtedly meant to say, *shall and may be stopped up, &c.* Ed.

verdict is to stand ; but if they shall be of a contrary opinion, a nonsuit is to be entered.

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Tyrwhitt, for the plaintiff. The question is, whether, under the statutes 3 Geo. 4, c. 126, and 4 Geo. 4, c. 95, the commissioners of the roads in the district, had or had not authority to stop up the road in question ; for if they had, as a trespass is acknowledged to have been committed on the road, the plaintiff is clearly entitled to maintain this action. Now, looking to the provisions of the two statutes altogether, (and by the latter of them the two are declared to be “ as one act”), it seems plain that the commissioners had that authority. By s. 4 of the 3 Geo. 4, c. 126, that act is extended to all acts then in force, or which should thereafter be passed, for making, widening, *turning*, amending, repairing, or maintaining any turnpike roads in England. By s. 83, the trustees or commissioners are authorized and empowered to make, *divert*, shorten, *vary*, *alter*, and improve the course or path of any of the roads under their management. By s. 84, it is made lawful for the trustees or commissioners of any turnpike road to treat, contract, and agree with the owners of any lands, which they shall see necessary to purchase for the purpose of widening *diverting*, *altering*, and improving such road. By s. 86, when a new road is completed, the trustees or commissioners are authorized to stop up and discontinue the old road, “ *unless* leading over some moor, heath, common, uncultivated land or waste ground, or to some *church*, *mill*, *village*, town or place, lands or tenements, to which the new road does not immediately lead, *and*. which may therefore be *deemed proper* to be kept

after mentioned), and for which no particular method of relief hath been already appointed ; such person may appeal to the justices of the peace, at the next general or quarter sessions of the peace, to be held for the county, &c. wherein

the cause of such complaint shall arise : provided always, that no appeal shall be allowed against any conviction for any penalty or forfeiture which shall not exceed the sum of forty shillings.

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open, either as a public or private way, for the use of any individual." The question in this case will principally turn upon the operation and effect of that exception; that is, whether it absolutely ousts the trustees of their general power in the particular cases there excepted: and, if it does, whether this is one of those excepted cases. It is submitted that this clause does not oust the trustees of their general power, but is merely directory to them in the exercise of their discretion in the excepted, as well as in all other cases. It will be said, that though the trustees have a general power to stop up roads not falling within the exception, they are absolutely restrained from stopping up any road which leads to any church, &c., if the new road does not immediately lead to it. But if so, no turn-pike road could ever be stopped up; for if a road is turned there must always be *some* place which stood in the old line, and which not being on the new line, the communication from thence to some church, &c., will not be immediate. Besides, that argument assumes that the word "*to*" some church, &c., means *towards*, whereas its true meaning undoubtedly is, *immediately to*; for if the old road did not lead immediately to the church, &c., the new road could not be objectionable for not leading immediately to it. There are cases in which it has been decided that the word *to*, or *unto*, does not mean *towards*. In *Wright v. Ratray* (a), the declaration alleged a right of way from *A. unto D.* It was found to stop short at *C.*, and the declaration was held bad: though Lord *Kenyon* seemed to be of opinion that it might have been sustained if the word *towards* had been used. Here, the old road did not lead from the defendant *Welch's* premises immediately to Tile Mill; and with respect to the church, the new road is as near as the old one was. The exception appears manifestly to have been introduced with reference to the subsequent clause, s. 88. That section relates to cases where the old road is sold, or given in payment for land taken

(a) 1 East, 377.

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for the new road. But it is *in pari materiâ* with s. 86, which relates to cases where the old road is given up to the owners of adjoining lands, in lieu of land occupied by the new road; and it shews, that in each class of cases, it is in the discretion of the trustees whether they will give up or exchange the old road for the new, absolutely, or subject to a right of way, as in s. 86; or, whether they will sell the old road, or give it in payment for the new, under s. 88; or will lay out a new passage from the new road to some church, &c., if they find it necessary. Secondly, the trustees having a general jurisdiction to divert and stop up this road, if they have exceeded their jurisdiction, either in not laying a new passage from the new road to the defendant *Welch's* premises, or in not selling or exchanging the old road subject to his right of passage to Tile Mill, the defendants ought to have appealed to the next sessions, under the 4 *Geo. 4*, c. 95, s. 87. Had they done that, the sessions might have amended the order in either of the particulars above-mentioned, or have quashed it altogether; but as they have neglected to appeal, and the order is good upon the face of it, and contains nothing shewing an excess of jurisdiction, the question is now concluded. In *Bonnell v. Beighton (a)*, where an enclosure act gave commissioners power to set out and make roads, &c., and directed that the expenses should be borne by the proprietors in certain proportions, to be ascertained in one general rate, and then gave an appeal to the sessions to all parties aggrieved: it was held, that an objection to the rate, on account of the commissioners having expended money improperly, could not be tried in an action for trespass, but that the party aggrieved must appeal to the sessions. It was laid down in *Durrant v. Boys (b)*, that where nothing appears on the face of a poor rate to shew that the overseers have exceeded their power in making a prospective rate, the remedy is by appeal to the sessions; for they had a general power to make rates, and the

(a) 5 T. R. 182. And see *Fawcett v. Foulis*, *post*. (b) 6 T. R. 580.

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sessions are *forum domesticum* in such matters: and, therefore, the plaintiff's goods having been distrained for his proportion of the rate, it was held that he could not maintain trespass. *Davidson v. Gill* (a) and *Welch v. Nash* (b), will be relied on as supporting a contrary principle. They were both cases of questions arising out of orders of magistrates made under the general highway act, 13 Geo. 3, c. 78, s. 19, and in both of them it was held that trespass would lie. But, in the former, the defect was apparent upon the face of the order; and in the latter, the order was an *ex parte* order of justices, having no plan annexed to it, according to the form directed by the act (c). So that those decisions do not affect the present argument, and that is the view taken of those cases by the Courts in *Gray v. Cookson* (d), and *Britain v. Kinnaird* (e). Thirdly, the trustees being authorised to exercise a discretion, and having exercised it fairly, this Court cannot review their decision. They have here exercised a sound discretion; for, upon the whole, there is a saving to the public by the new road, both of distance, and, as a necessary consequence, of repairs. For *discretio est scire per legem quid sit justum* (f); and they have accordingly been guided by the parallel enactment as to highways, not turnpike, in 55 Geo. 3, c. 68, s. 2, which authorizes the diverting any such highway, "so as to make the same nearer or more commodious to the public." The former act, 13 Geo. 3, c. 78, s. 19, repealed by 55 Geo. 3, c. 68, s. 1, and replaced by s. 2, contained the same directory words. It may be added, that if the trustees had no power to shut up the road as against the defendant *Welch*, it follows that it was a private and not a public way; and then the plea is bad, for that claims a *public* right of way. On all these grounds it is submitted that this action is maintainable, and that the verdict found for the plaintiff ought to stand.

(a) 1 East, 64.

(b) 8 East, 394.

(c) Schedule, No. XXI.

(d) 16 East, 22.

(e) 1 Brod. & Bingh. 441. S. C.

4 J. B. Moore, 57.

(f) Keighley's case, 10 Co.

Rep. 140 a.

Talfourd, contra. If the trustees had power, under the acts of parliament, to stop up the road, it must be admitted that the question, whether they have exercised a sound discretion in so doing, cannot be tried by this Court. But the defendants, in the name of the public, deny that they had any such power. This is not a question between individual parties, but between the trustees, as a public body, and the public themselves. The trustees have stopped up a public highway; and the question is, whether, as against the public, they had authority to do so. The old road led to a village, to a church, to a mill, and to lands, to which the new road does not immediately lead; and therefore was expressly within the exception of 3 Geo. 4, c. 126, s. 86. It has been said, that the word "to" in the act of parliament, must be taken to mean *immediately to*, but no good reason is assigned for the position; and many instances might be cited in which the word *to* has, in legal interpretation, been held to mean *towards*. When the language of the exception is duly considered, the effect of it seems clearly this: an express prohibition against stopping up and discontinuing, as a public highway, any old road leading to a church, &c., to which the new road does not immediately lead, except in two instances; the one where the old road is kept open as a public way, for the use of some inhabitant at large, and the other where it is kept open as a private way, for the use of some individual. In this view of the case, the order of the trustees is clearly bad. But the defendants were not bound to appeal against it to the quarter sessions. The 3 Geo. 4, c. 126, gives no appeal; and though the 4 Geo. 4, c. 95, does, still it only declares that parties aggrieved *may* appeal; it is not compulsory upon them to pursue that mode of remedy. In the case of a road improperly stopped up, under the 3 Geo. 4, c. 126, which gave no appeal, the public would clearly have had a right to continue to use the old road, at least during the interval before the passing of the 4 Geo. 4, c. 95; and, as the

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latter contains no words taking away that right, but merely gives the privilege of appeal, the right remains unimpaired and unaltered. *Welch v. Nash* (a), is a decisive authority to show that the order of the trustees is not conclusive, and that this Court may entertain the question of its regularity.

Cur. adv. vult.

Judgment was afterwards pronounced as follows :

BAYLEY J.—We are all agreed in the opinion that this action is maintainable. It was an action of trespass *quare clausum fregit*; to which the defendants pleaded a public right of way over the *locus in quo*. The *locus in quo* had been part of a public highway, and the question was, whether it had been properly and legally stopped up, so as to take away from the public, and the defendants, the right which they had formerly possessed over it, and to vest the exclusive right over it in the plaintiff; and that question mainly depended upon the construction to be given to the 86th section of the 3 Geo. 4, c. 126. It was contended on the part of the defendants, that as the old road was one leading to a church, a village, a mill, and lands, to which the new road does not immediately lead, the trustees had no authority to make the order for stopping it up, they being expressly prohibited from so doing by the exception in the clause I have mentioned. Now, s. 83 of the act, empowers trustees, generally, to make, divert, shorten, vary, alter, and improve the course or path of any of the roads under their management; and s. 86 provides, that when new roads are completed, the lands or grounds constituting any former roads, or so much and such part or parts thereof as, in the judgment of the trustees, may thereby become useless or unnecessary, shall and may be stopped up and discontinued as public highways, unless leading over some moor, heath, common, uncultivated land, or

(a) 8 East, 394.

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waste ground, or to some church, mill, village, town, or place, lands or tenements, to which such new roads do not immediately lead, and which may therefore be deemed proper to be kept open, either as public or private ways, for the use of any inhabitant at large, or any individual. If that is an absolute and express prohibition against stopping up any of the roads there described, the trustees certainly had no authority to stop up the road in question; but if it leaves the trustees a discretionary power over such roads, they had authority to stop up this road, and their order is binding. It has been insisted that the exception ousts the trustees of all power in all the excepted cases; and the former part of it, if considered alone and independently of the rest, certainly warrants the argument. But the former part seems to me to be much qualified by the latter, which, in my opinion, clearly vests the trustees with a discretionary power to act upon the former part, or not, as they may think proper. The exception appears to me to divide itself into two branches: the first pointing out the different descriptions of roads to which it *may* be applied; and the second, leaving it to the discretion of the trustees to what instances, and in what modes to apply it, with the somewhat remarkable power of converting old public roads into private ways. If the former branch is to be taken alone, no road of the several descriptions there mentioned can be legally stopped up; but the second branch must have been added for the purpose of qualifying the generality of the first, and of shewing how it is to be applied, according to the judgment and discretion of the trustees. No other construction will give the whole passage a sensible and reasonable meaning. The latter part speaks of roads "which may be deemed proper to be kept open." Deemed proper by whom? Clearly by the trustees; not by a jury to be impanelled to try the question; for, in that case, there would be no end of disputes, because juries might differ in their opinion, and every instance of diverting a road would be productive of endless litigation and ruinous

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expense. Then they are to be kept open, "either as public or private ways." Unless that is to be done according to the discretion of the trustees, and unless they have a discretionary power of doing it, it can never be done at all; for there is no mode of converting a public road into a private way, except by an act of parliament. Then, here the trustees, in the exercise of their discretionary power, have ordered the old road to be stopped up entirely, and to be given to the plaintiff; the consequence of which is, that it has ceased to be a public road, and has become the property of the plaintiff, and the defendants having trespassed upon it, are liable in this action. The 3 Geo. 4, c. 126, giving no appeal to the sessions, left the judgment of the trustees in these cases final and conclusive. If that was a defect, it has been remedied by the 4 Geo. 4, c. 95, which gives to parties aggrieved by the trustees a remedy by appeal, and that remedy the defendants might have adopted. For these reasons, I am of opinion, that the plaintiff in this case had a right of action for the trespass committed by the defendants, and that the verdict which he has obtained ought not to be disturbed.

HOLROYD, J., concurred.

LITLEDALE, J.—I am entirely of the same opinion. The whole tenor of the language used in the exception is such as shews decisively that it was intended to vest a discretionary power in the trustees. It excepts out of the exception roads, "which may be deemed proper to be kept open either as public or private ways." "*May*" is discretionary; and if the clause had been meant to be compulsory, the word *must* would have been used, which would have rendered the passage nonsense. "*Deemed*" is discretionary; both those words imply necessarily an exercise of judgment. "*Either as public or private ways,*" must mean that the trustees are to decide in which of two characters the road is to be kept open; and "*for the use of*

any inhabitant at large, or any individual," that they are to decide to which of two purposes the road is to be applied. This construction is the more proper and convenient, because it reconciles s. 86 with the subsequent s. 88, which gives the trustees a discretionary power in express terms.

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Judgment for the Plaintiff.

The KING v. the INHABITANTS of SANDHURST.

TWO Justices, by their order, removed *Thomas Slark, Sarah*, his wife, and their four children, from the parish of East Hampstead, to the parish of Sandhurst, both in the county of Berks; and the sessions, on appeal, confirmed the order, subject to the opinion of this Court upon the following case:

The pauper, *Thomas Slark*, being unmarried, and without any child, was hired on the 13th May, 1813, as a servant on the establishment of the Royal Military College, at Blackwater, in the parish of Sandhurst. By a warrant under the hand of his late Majesty, dated 27th May, 1808, all matters relating to the interior regulations and economy of the establishment, were placed under the cognizance of a collegiate board, consisting of the governor of the college, the lieutenant-governor, and several other persons, in the warrant mentioned. Certain regulations for men-servants hired for the college, are entered in a book kept for that purpose, containing, among other things, the following rules:—"The servants are to obey all orders they may receive from the officers of the institution, the staff-serjeants, and the purveyor. They are allowed wages, at

The pauper was hired by one of the superintendents of the Royal Military College at Sandhurst, at 16s. a week, and two suits of clothes per annum; to give a month's notice if he wished to leave, but to be dismissed (for misconduct), at any time. The college is exempt from poor rates; and pays no taxes for its servants. The pauper remained a year in the service, boarding and lodging in the college:—Held, that he acquired a settlement in Sandhurst.

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the rate of 16s. per week, with one dress, and one undress suit of clothes per annum, subject to such stoppages as may be ordered, but which shall be paid up every three months, after deducting for the charge of breaking of furniture, crockery, &c., belonging to the college, that may have been committed during that period. Should a servant wish to leave the college, he must give one month's previous notice; but should the college see reason to be dissatisfied with his conduct, it retains the power of dismissing him at a moment's notice." The customary mode of hiring such servants for the establishment, was, by reading the rules over to them at the time of hiring them, and requesting their signature to them, in witness of their agreement to serve on the terms prescribed. The pauper was hired by Colonel *Butler*, the lieutenant-governor, one of the officers constituting the collegiate board, by whom the servants were usually hired. He heard the above regulations read at the same time, by the quarter-master, and signed his assent in the usual manner, by subscribing his mark to them. He remained in the service, and received his wages, as above agreed on, for two years and a half, before he married; he lived and slept in the body of the college, and was employed in making the beds of two of the gentlemen cadets, assisting in sweeping and cleaning the rooms, and various other occupations for the service of the college, exclusively, as directed by the officers of the college. He was discharged with several other public servants of the college, without notice, in the year 1819, on a reduction of the college establishment, by order of government. The body of the college is exclusively appropriated to public uses, for study and lodging of the gentlemen cadets, and is exempt from poor rates, as being a public building. The pauper, and 32 other persons, were employed in the same service, not as the private servants of any individual, but as the public servants of the establishment, to obey, generally, the officers of the college, and they were paid by the pay-serjeant,

out of the funds supplied for the maintenance of the college, and they were not returned, paid, or assessed as servants, to the collector of the taxes. The pauper afterwards married his present wife, and the children removed with him were the issue of that marriage. The sessions found that there was a general hiring sufficient to confer a settlement, if a settlement could be acquired by such hiring and service in a public establishment like the college. The question for the opinion of the Court is, whether the pauper acquired a settlement by such general hiring and service in the college.

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Shepherd and *Talfourd*, in support of the order of sessions. The sessions came to the right conclusion. All the requisites of the statute 3 and 4 W. & M., c. 11, s. 7, are to be found in the contract in this case; for here is an unmarried person, not having child or children, having been lawfully hired into a parish for a year. [*Bayley, J.* Was the pauper hired for a year; that is, was there a good general hiring? The case finds, that the college retained the power of dismissing any servant at a month's notice]. But the case states, that the sessions found that there was a general hiring sufficient to confer a settlement, if a settlement could be acquired by such hiring and service, in a public establishment like the college. The sessions, therefore, have decided the question of *fact*, whether there was a general hiring; and have referred to this Court only the question of *law*, whether service under such a hiring, with such a body as the college, can confer a settlement. This Court, therefore, cannot take the first question into consideration; it is a question of fact, decided by the sessions, and upon which their decision is conclusive. Then the second question, though it is one of some novelty, and of great importance, is not, when properly examined, one of much difficulty. There seems to be no good reason why a public body, like the college, should not have the same power of contracting as any individual has.

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Whether the service is performed to one master or two, or more, appears wholly immaterial; for the question in all these cases depends, not on the nature and character of the master, but on the nature and character of the servant and the service. [*Littledale, J.* Whom could the servant in this case have sued for his wages, if they had been left in arrear?] He might clearly have sued Colonel *Butler*, by whom he was hired, who was the acting superintendent of the college, and by whom the servants were usually hired. But, even if he could not maintain any action for his wages, it by no means follows that he could not acquire a settlement by his service. There are some cases in which it has been expressly provided by act of parliament, that the servants of public establishments shall not acquire settlements by their services; as by the 52 *Geo. 3. c. 72*, an act for the better cultivation of timber in the forest of Alice Holt, in the county of Southampton, which expressly provides that no person shall, by hiring and service, either for the preservation of woods and plantations, or of the game in the said forest, gain thereby any settlement in the parish of Binstead, in which the forest is situate; and many other instances of the same kind might be mentioned (a). Now the inference deducible from the fact of such provisions being made by the legislature, with reference to some other public establishments, and not with reference to this college, which is regulated by an act of

(a) As 33 *Geo. 3, c. 54, s. 24*, which provides, that no apprentice or servant to any member of any Benefit Society, residing in any parish, under that act, shall on that account, acquire a settlement; 13 *Geo. 2, c. 22, s. 7*, which provides, that no child, nurse, or servant, received, maintained, educated or employed within the Foundling Hospital, shall gain any settlement in the parish or place where such hospital is situate, by virtue of

such their reception, continuance, hiring or residence, in such hospital; and 9 *Geo. 3, c. 31, s. 8*, which provides, that no person who shall be admitted into the Magdalen Hospital, as a penitent prostitute, or who shall be employed therein as an hired servant, shall, by reason of such admittance or service, gain a settlement in the parish in which the said hospital is, or shall be situate.

parliament, is very strong, and shews conclusively, that there was no intention on their part to put the servants of the college upon a different footing, with respect to their competency to acquire a settlement by hiring and service in the college, from persons hired by private individuals.

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Tindal, S. G., Nolan and Stone, contra. The college does not contribute towards the relief of the poor of the parish within which it is situate; it ought not, therefore, to burthen the parish, by bringing into it a number of persons who may afterwards become chargeable upon it. The Court are entitled to look into the whole case, for it is referred to them generally, and to entertain both the questions arising upon it, namely, was there a general hiring, and if so, did service under it confer a settlement? First, there was no general hiring here. The statute 3 & 4 W. & M., c. 11, s. 7, requires a *lawful* hiring, that is, that there shall be such a contract between the parties, as either is expressly, or may be considered by the law impliedly, as a contract for a year. It is of the very essence of such a contract, that it is reciprocal; that the one party shall be bound to retain, and the other be bound to stay, in the service, for a full year. There was no such reciprocity in this case; for though the servant, if he wished to leave the college, was bound to give a month's previous notice, the college retained the power of dismissing him at a moment's notice. This was, what has been termed, a unilateral contract; and under such a contract, it is impossible that any *lawful* hiring can take place. [*Bayley, J.* The college may have power to defeat the contract, under certain circumstances, before the year is out; and yet the contract may originally have been one for a year]. It is part and parcel of the contract, that the college may terminate it whenever they please; and that cannot be a contract for a year. It was a contract for a period less than a year, under which a general hiring cannot be presumed. [*Bayley, J.* The power of

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the college to defeat the contract is very limited, it is only if they shall see reason to be dissatisfied with the servant's conduct, that they retain the power of dismissing him at a moment's notice : and I doubt, therefore, whether they were warranted in so dismissing the pauper, under the circumstances stated in the case.] But he could not possibly maintain an action against any person for wrongfully dismissing him, or even for arrears of wages ; which proves that there is no person by whom he was lawfully hired, or with whom he stood, properly speaking, in the relation of servant. Secondly, even if there was a general hiring, still service under it, in a public establishment like the college, will not confer a settlement. In order to constitute such a contract as is required by the statute, the master must be a person resident within the parish where the service is performed ; but though the individuals in whom the management of the affairs of the college are vested, are resident within the parish of Sandhurst, still there is not any one of them who can properly be called the master of the pauper, within the meaning of that statute. The law contemplated that the master should be a person having property and a stake in the parish ; but all the property appertaining to this college is, by the statute 52 Geo. 3, c. 124, vested in the crown. The pauper, therefore, was not a servant in the legal or ordinary sense of the word ; he rather resembled a soldier employed on civil service ; he was not returned to the collectors of taxes as a servant ; he was neither hired, nor treated, nor employed, as a servant in ordinary cases is ; he must be considered rather as an officer of the crown, than as a servant, or at least as a servant of the crown, and not *sui juris* to adhere to the contract, or to abandon it, in the mode that servants in the general sense of the word are.

BAYLEY, J. (after consulting with the other Judges).—
 Upon the first point made in this case, we have none of

us any doubt. We are all of opinion that there was what the law considers as a general hiring: a hiring for a year, with power on both sides to determine the contract before the expiration of the year; a contract defeasible, but not defeated, and therefore a good contract for a year. Upon the other point, we wish to take time for consideration, and to consult my Lord *Tenterden*, of whose opinion, as the question may be of some general importance, we are anxious to have the benefit.

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Cur. adv. vult.

Judgment was now delivered by

BAYLEY, J., who, after shortly recapitulating the facts of the case, thus proceeded.—Upon these facts two questions arose; first, whether there was such a general hiring as the law would construe into a hiring for a year; and secondly, whether service under such a hiring with the college, would confer a settlement. We have consulted my Lord *Tenterden* upon the subject, and I have the satisfaction to state, that his opinion is in unison with that of my learned brothers and myself, before whom the case was argued: so that what I now say may be considered as the judgment of the whole Court upon the case. We are of opinion that the pauper acquired a settlement in the parish of Sandhurst. We think there was clearly a “lawful hiring for a year” within both the words and the meaning of the statute of *William*. It was part of the agreement, that if the pauper wished to determine the service, he was to give a month’s notice; but that the college might dismiss him, *for misconduct* (which was not the ground of his dismissal), without any notice at all. The contract, therefore, was defeasible by either party, within a year, but it was not defeated; and the mere power to defeat a contract, will not render it less a contract for a year, if in its other circumstances it satisfies that description. It may be a defeasible hiring; but it is not less a hiring. It

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was objected that the service being in a public establishment, would not confer a settlement. We think there is no weight in the objection. Hiring and service is a matter of a personal nature; and the question is, not by *whom* the servant is hired, but whether he *is* lawfully hired, and performs a year's service under that hiring. Here the pauper was lawfully hired into the parish, no matter whether by a public body, or a private individual, and performed a year's service under the hiring. He has therefore gained a settlement in the parish, and the order of sessions, adjudging him to have done so, must be confirmed.

Order of Sessions confirmed (a).

(a) See *Rex v. Hurstmonceaux*, *post*.

No action lies against justices for a distress under a conviction for not doing statute labor on the high-ways, where, by reason of the plaintiff's occupying land within the parish, the magistrates have jurisdiction. A prescriptive exemption in respect of the particular estate or hamlet, should be pleaded or given in evidence before the magistrates, or made the subject of an appeal to the Quarter Sessions.

FAWCETT against FOULIS, Bart., and another.

^{7 Nov 394}
TRESPASS for breaking and entering plaintiff's close, situate, &c., at the parish of Arncliffe, in the county of York, and seizing, &c., plaintiff's sheep. Plea, not guilty. At the trial before *Bayley, J.*, at the last assizes for the county of York (b), it appeared that the defendants, who are magistrates in the North Riding, had caused a distress to be taken in December, 1826, on the defendant's goods, for penalties, for not performing statute labor on the high-ways in the township of Ingleby; the object of this proceeding being, to ascertain whether the occupiers of lands in the hamlet of Arncliffe, within the parish of Arncliffe, were liable to contribute to the repairs of the roads in the township of Ingleby in the same parish; it

(b) Counsel for the plaintiff, *Brougham, F. Pollock*, and *Alderson*; for the defendants, *Cross*, Serjeant, *Parke*, and *Alexander*.

being contended on the part of the occupiers of lands in the hamlet of Arncliffe, that they were discharged from such liability by reason of their exclusively repairing the roads in that hamlet. The following is a copy of the warrant of distress :—" North Riding of Yorkshire. To the constable of the township of Arncliffe in the said Riding. Whereas, *John Fawcett*, of the parish of Arncliffe, in the said Riding, farmer, is duly convicted before us, Sir *William Foulis*, Bart., and *Benjamin Flounders*, Esq., two of his Majesty's justices of the peace, in and for the said Riding, upon the oath of *Thomas Peacock* of the parish of Arncliffe aforesaid, a credible witness. For that the said *John Fawcett*, was on the 28th day of September, now last past, served with a notice under the hand of *Thomas Peacock*, surveyor of the highways of the parish of Arncliffe aforesaid ; whereby, the said *John Fawcett*, was required to send one wain, cart or carriage, furnished with no less than two able horses and one able man, *with proper tools* to attend the same ; to be at the Tontine inn, to load stones from Mr. *Thomas Park*'s Ellerbeck, to the new road within the said parish, near *John Wilson*'s farm, on Tuesday the 3rd, Wednesday the 4th, Thursday the 5th, and Friday the 6th days of October, now last past, by 8 o'clock in the morning, to work diligently eight hours in repairing the highways within the parish of Arncliffe, in the county of York, or compound for the same two days before the respective days appointed to work ; and that the said *John Fawcett*, neglected to attend and perform such statute duty as was required by such notice, contrary to the statute in that case made and provided ; by reason whereof, the said *John Fawcett*, hath forfeited four several sums of five shillings, amounting together to the sum of one pound, to be distributed as herein mentioned, which he hath refused to pay. These are therefore in his Majesty's name to command you to levy the said sum of one pound, by distress of the goods and chattels, of him, the said *John Fawcett*, and if within the space of

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four days, next after such distress, by you taken, the said sum, together with the reasonable charges of taking and keeping the same, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale that you do pay the sum of one pound to the surveyors of the highways for the parish of Arncliffe, where the said neglect or default happened, to be employed towards the repairs of the said highways, returning the overplus, on demand, to him the said *John Fawcett*, the reasonable charges of taking, keeping, and selling the said distress being first deducted; and if sufficient distress cannot be found of the goods and chattels of the said *John Fawcett*, whereon to levy the said sum of one pound, that then you certify the same to us, together with this warrant. Given under our hands and seals this 9th day of December, 1826.

(Signed),

WILLIAM FOULIS.

BENJAMIN FLOUNDERS."

It was admitted, that previously to the issuing of this warrant, the plaintiff had been convicted under the 13 Geo. 3, c. 78, and that proper notices of action under 24 Geo. 2, c. 44, had been given, and that the action had been commenced in due time. That the plaintiff, on the 8th September, 1826, was served with such notice from the surveyor of the highways, as stated in the warrant of distress, and that the plaintiff did not perform such statute duty, or compound for the same, pursuant to the said notice. That the plaintiff occupied a messuage, farm and lands, in the said parish of Arncliffe, of the annual value of 200*l.*, and kept and employed thereon such team, as in the said notice mentioned; and that the work required of the plaintiff was not more than his just proportion, if he was liable to work at all. That plaintiff was afterwards summoned to appear before defendants, to answer for his disobedience to such notice; and that

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plaintiff did accordingly appear before defendants, and was by them convicted in four several penalties of 5s. each for such disobedience. That defendants had full power and authority, under and by virtue of the said statute, to convict plaintiff in the several and respective penalties aforesaid, for the several and respective offences with which he stood charged before them; and that the same are the proper penalties to be imposed for such offences, if plaintiff was liable to be convicted at all. That an order under the hands and seals of defendants for the payment thereof, was issued and served upon plaintiff six days and upwards before the date and issuing forth of the said warrant. That the said distress was made within the parish of A. aforesaid, and was not excessive.

Cross, Serjeant, for the defendants, objected that the conviction being unappealed against, no action lay against the justices; and the learned Judge being of that opinion the plaintiff was nonsuited, with leave to move to set aside the nonsuit and enter a verdict for him with 1s. damages.

Brougham now moved accordingly. The question in the cause was, whether *Arncliffe Hamlet* was liable to statute labor for *Ingleby roads*, and whether the distress was lawful, being taken on the ground of a failure on the part of the plaintiff to send a wain and men to do statute labor for four days. The conviction was bad in law. The conviction was admitted. [*Bayley J.* It was produced by my direction]. The objection was plain upon the Highway Act, 13 Geo. 3, c. 78, ss. 34 (a), and

(a) Which enacts, that "the said surveyor to be appointed as aforesaid, together with the inhabitants and occupiers of lands, tenements, woods, tithes, and hereditaments within each parish, township, or place, shall, at proper seasons in every year, use their endeavours for the repair of the highways,


and shall be chargeable thereunto as followeth: that is to say, every person keeping a waggon, cart, wain, plough or tumbrel, and three or more horses or beasts of draught, used to draw the same, shall be deemed to keep a team, draught, or plough, and be liable to perform statute duty with the same

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in the parish, &c., where he resides, and shall six days in every year (if so many days shall be found necessary), to be computed from Michaelmas to Michaelmas, send on every day and at every place to be appointed by the surveyor for the amending the highways in such parish, &c., one wain, cart, or carriage, *furnished after the custom of the country* with oxen, horses, or other cattle, and all other necessities fit to carry things for that purpose, and also two able men with such cart, &c.; which duty, so performed, shall excuse every such person from his duty in such parish, &c., in respect of all lands, &c., not exceeding the annual value of 50*l.*, which he shall occupy therein; and every person keeping such team, draught, or plough, and occupying in the same parish, &c., lands, &c., of the yearly value of 50*l.* over and beyond the said yearly value of 50*l.*, in respect whereof such team-duty shall be performed, and every such person occupying lands, of the yearly value of 50*l.*, in any other parish, &c., besides that wherein he resides, and every other person not keeping a team, draught, or plough, but occupying lands, &c., of the yearly value of 50*l.*, in any parish, &c., shall, in like manner, respectively, and for the same number of days, find and send one wain, cart, or carriage, furnished with not less than three horses or four oxen, and one horse or two oxen, and two horses and two able men, to each wain, cart, or carriage, and in like manner for every 50*l.* per annum, respectively, which every such person shall further occupy in any such parish,

&c., respectively, such wains, carts, or carriages to be employed by the surveyor in the repairing and amending the highways within the parish, &c., where such lands, &c. shall respectively lie; and every person who shall not keep a team, draught, or plough, but shall occupy lands, &c., under the yearly value of 50*l.* in the parish, &c., where he resides, or in any other parish, &c.; and every person keeping a team, draught, or plough, and occupying lands, &c., under the yearly value of 50*l.* in any other parish, &c., where he resides, shall respectively contribute to the repair of highways, and pay to the surveyor of such parish, &c., respectively, in lieu of such duty, the sums following. (Then follows the enumeration). Which said several sums shall be considered as compositions, and shall be paid to the surveyor of the parish, &c., in which they are charged, for the use of the highways therein, at the time such compositions are to be paid under the authority of this act, or within ten days after, or in default of such payments such money shall be levied by distress and sale of the goods and chattels of the person or persons refusing to pay the same, in such manner as the forfeitures for the neglect in performing the statute duty are hereby authorised to be levied and raised. Provided, that no person keeping such team, draught, or plough, and performing duty with the same as aforesaid, in the parish, &c., where he resides, and not occupying lands, &c., within the same, of the yearly value of 30*l.*, shall be obliged to send more than one labourer with such team, draught, or plough."

37 (a). The conviction states, that the plaintiff was required to send one wain, cart, or carriage, *with proper tools*, to attend, or to compound for the same two days before. The order is in the alternative. The conviction is not so. It states, that the plaintiff neglected to perform statute duty. They were entitled to convict only for refusing to do both. Secondly, the conviction does not set forth how the plaintiff was liable. It should have stated, that he kept a wain or tumbrel, and three horses. If he keeps no cart, he is to pay money only. It is a mistake to say, he was liable to pay, or to do work according to what he kept.

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(a) "Every such surveyor shall, from time to time, give to, or cause to be left at the house, or usual place of abode, of every person or persons so liable to perform such duty, or labour, as in this act directed, four days' notice at the least, of the day, hour, and place, upon which each of the said day's duty shall be required to be performed, and every person or persons making default in finding and sending such wain, cart, or carriage, furnished as aforesaid, and such able men with the same as herein required, or in performing the said duty at the time and place, and in the manner by this act directed, shall, for every such default or neglect in sending such wain, &c., with such men as aforesaid, forfeit the sum of 10*l.*, and for every default in sending every cart with one horse and one man 3*s.*, and for not sending every cart with two horses and one man 5*s.*, and every person or persons making default in sending any such labourer, and every person making default in performing such labour, at the time and place, and in the manner directed by this act, or in paying such composition

money for the same, as hereinafter mentioned, shall, for every such neglect, forfeit the sum of 1*s.* 6*d.*, all which forfeitures shall be applied for the use of the highways within the parish, &c., where the same shall arise, and the said surveyor shall fairly and equally demand and require such duty, and labour, from every person or persons liable to perform the same, according to the directions of this act, without favour or partiality to any person or persons whomsoever; and if in any parish, &c., it shall not be necessary to call forth the whole duty in any year, it shall be abated in a just and equal proportion amongst all persons liable to the same; and the said surveyor may and shall, and he is hereby required, with all convenient speed, after default made in performance of such duty, or labour as aforesaid, to proceed for the recovery of the penalties or forfeitures hereby inflicted for the same, respectively, in manner hereinafter directed, so that the same may be recovered before he makes up his accounts, in the manner directed by this act."

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 34 Geo. 3. c. 74/2-
 is implied in, in
 the case of *Franklin*

The statute does not say, that a person keeping, &c., shall furnish tools; but that the wain, cart, or carriage, shall be furnished, according to the custom of the country. The surveyor is to furnish tools. There should have been a finding by the trustees, that the work was necessary. [Lord Tenterden, C. J. That is antecedent to the surveyor's application]. The 38th section (a) says, "that parties may compound," &c. The first objection is, that the warrant does not set forth that the defendant was liable. Occupying lands constitutes no liability. Secondly, *non constat*, the defendant had not redeemed himself from any liability to perform the statute duty by payments. Thirdly, four offences are here included in one conviction. The justices cannot, by a mere statement, give themselves jurisdiction. [*Bayley, J.* Of that there is no doubt. You might have pleaded before the magistrates that they had no jurisdiction].

(a) "Any person or persons liable to perform the said duty by sending one or more team or teams, draught or draughts, plough or ploughs, with men, horses or oxen, in manner aforesaid, shall and may compound for the same, if he, she, or they, shall think fit, by paying to the said surveyor, at the time, and in the manner hereinafter mentioned, such sum or sums of money, as the justices of the peace, for the limit wherein such parish shall be, or the major part of them, at their said special sessions, to be held in the first week after Michaelmas quarter sessions in every year, shall adjudge and declare to be reasonable, not exceeding six shillings, nor less than three shillings, for each team, &c., for each day, and in default of their adjudging or declaring the same, the sum of 4s. 6d. for and in lieu of every such day's duty for each team, draught, or

plough; and for every cart and one horse, or beast of draught, 2s., and for every cart with two horses or beasts of draught, 3s., for and in lieu of every day's duty; and every inhabitant liable to perform such duty or labour as aforesaid, and not chargeable in any other respect as aforesaid, shall and may compound for the same, if he, she, or they shall think fit, by paying to the surveyor the sum of fourpence, for and in lieu of every such day's duty or labour respectively, at the time, and in the manner hereinafter directed, for the payment of the composition money."

The provisions of this section are modified by 34 Geo. 3, c. 74; 44 Geo. 3, c. 5; and 54 Geo. 3, c. 109; but it does not appear, that the alteration introduced by these statutes, would have materially affected the argument.

LORD TENTERDEN, C. J.—The nonsuit was right. The conviction was good in substance. By the act, work is to be done from which the parties are, however, allowed to redeem themselves by composition. This was not acted upon here. If paid, it would have been a good defence; but the proceeding must be for not doing the work. Secondly, the surveyor directs the plaintiff to attend *with tools*. If he had attended without tools, that point might have been raised; but he does not attend at all. Thirdly, he is the occupier of lands. That is sufficient in substance. Whether the question could have been tried which was meant to have been raised, is doubtful. *Ingleby* and *Arncliffe* being both in the same parish, if the liability to repair was several, there should have been separate surveyors. The proper way would have been, to object to the appointing of one surveyor for both districts. The surveyor was appointed for the whole parish. I consider the case with analogy to the poor laws. A person may bring his action on the ground of an entire want of jurisdiction (a). There the jurisdiction is given over persons having property within the parish.

HOLROYD, J.—I entertain considerable doubts, whether the justices had authority to make this order. With respect to the poor rates, where a party is not rateable, the magistrate has no jurisdiction. If notice had been given to a person not having property in the township, the magistrates would have had no jurisdiction, and the question might have been tried in the same way as in the case of a poor rate. Here the property was within the parish, for which the surveyor was appointed (b).

LITLEDALE, J.—I am of opinion, that no action lies against these magistrates. The surveyor was appointed for

(a) *Vide Milward v. Coffin*, 2 1 Burr. 580; *Bonnell v. Beighton*, 5 T. R. 182; *Durrant v. Boys*, 6 W. Bla. 1331.

(b) *Vide Hutchins v. Chambers*, T. R. 580.

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the whole parish. The party being taken before a magistrate, it is a question whether he should not have pleaded to the jurisdiction. Here he has pleaded only not guilty. *Prima facie* the magistrates had jurisdiction, and it was therefore the duty of the plaintiff to give evidence before them.

LORD TENTERDEN, C. J.—There might have been an appeal to the quarter sessions, where these points might have been decided.

Rule refused (a).

(a) And see *Res v. Inhabitants of Ellicombe*, M'Clel. & Younge, of Buckinghamshire, 2 D. & R. 450; *Chanter v. Glubbe*, post. 689, 1 B. & C. 485; *Underhill v.*

COATES and another, ASSIGNEES of COX, a Bankrupt,
 against LORD VISCOUNT HAWARDEN.

An Irish peer who has voted in the election of representative peers, cannot be arrested or sued by *capias*.

ON the second day of this term, the Attorney-General obtained a rule, calling upon the plaintiffs to shew cause why the writ of *pluries capias* issued in this cause should not be set aside, and the bail bond given to the Sheriff of the county of Sussex should not be delivered up to be cancelled, and why the plaintiffs should not pay the costs of the said bail bond, and of this application to be taxed by the master, and in the meantime proceedings be stayed. This was moved on the affidavit of the defendant, stating that he was a Viscount of that part of the United Kingdom called Ireland (a); that his right to vote in the election of

(a) By 40 Geo. 3, cap. 67, article 4, it is enacted that "all peerages both of Great Britain and Ireland, now existing, or hereafter to be created, shall, in all other

respects be considered as peerages of the United Kingdom, and that the peers of Ireland, shall, as peers of the United Kingdom, be sued and tried as peers, except as afore-

the representative peers for Ireland had been allowed by the House of Lords, and exercised by the defendant (a);

said, and shall enjoy all privileges of peers, as fully as the peers of Great Britain; the right and privilege of sitting in the House of Lords, and the privileges depending thereon, and the right of sitting on the trial of peers only excepted.

(a) In *Lord Banbury's case*, 2 Salk. 512; 2 Lord Raym. 1247, the Court refused to grant a super-seedeas to an arrest on a latitat, in favour of a defendant who claimed to be a peer, but had never sat in the House of Lords; and in *Storey v. Birmingham*, 3 D. & R. 486, this Court refused to direct a bail bond to be given up to be cancelled upon the mere fact of the defendant's being an Irish peer, without its being shewn that defendant had ever sat in parliament, or done any act in the character of peer; saying, that before the Court could interfere in that summary way, a clear case of privilege must be made out; and they left the defendant to plead his peerage. In another action against the same defendant brought by the executors of a party who had obtained a judgment against him in Ireland, the defendant filed the following plea. "And *Edward Birmingham*, Lord *Birmingham*, baron of *Athenry*, in Ireland, against whom the plaintiffs have issued their original writ by the name and addition of *Edward Birmingham, Esq.*, in his own proper person, comes and says, that he the said baron, sued as aforesaid, before and at the time of the issuing of the original writ in this cause, was and still is baron of

Athenry, in Ireland aforesaid. And this he is ready to verify. Wherefore, he prays judgment of the said writ, and that the same may be quashed, &c." The plaintiffs having replied that the defendant at the time of the issuing of the original writ, was not baron of *Athenry modo et forma*; the paper book was delivered on the 5th February, with notice of trial for the sittings after term. On the 9th February, a rule was obtained to shew cause why the trial should not be postponed till the sittings after Easter term, on an affidavit stating that in order to establish the defence, it would be necessary to bring witnesses from Ireland, and obtain much evidence from public records, parish registers, and other documents there, without which, he was advised, &c., that he could not safely proceed to the trial of this cause, especially as this deponent was advised, &c., that he could not safely proceed to trial without the testimony of Sir *William Bet-ham*, Knight, Ulster king at arms, and principal herald of all Ireland, and deputy keeper of the records in Birmingham tower, who was then in Ireland, and could not, as this deponent verily believed, consistently with his the said Sir *W. B.*'s official duties, at that time come to England, nor could this deponent safely proceed to trial without the production by the said Sir *W. B.* of certain national records, kept in the said Birmingham tower, in the castle of Dublin, which records would not, as this deponent was informed and be-

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and that he was entitled to all the rights, privileges, and immunities of an Irish peer (a); that the defendant was arrested at his residence at Brighton, on the 15th September, 1827, by an officer of the Sheriff of Sussex, and that he had been discharged from that arrest upon a representation of his privilege; that he immediately forwarded a strong remonstrance to the Sheriff, notwithstanding which he had been again taken under the same process on the 24th September, upon which occasion he had given a bail bond accompanied with a protest against the regularity of

lied, be intrusted to the care of any other person than the said Sir W. B.; that he purposed leaving London the following day, and to proceed forthwith to Ireland for the purpose of collecting the needful evidence in the support of his defence, but that it would not be possible to be prepared for trial at the time, for which, notice of trial had been given; that he expected that he should be able to obtain the attendance of the said Sir W. B., and the production of the said documents and other necessary evidence for the trial of the cause for the sittings after next Easter term. On the last day of Hilary term, cause was shewn against the rule by *Manning*, who urged that the defendant after suffering a judgment to pass against him in Ireland by the name of *Edward Birmingham*, Esq., had no right to require that the executors of his ereditor should try a question of peerage, and that a party who puts in a plea in abatement, should be prepared to establish his plea, and not occasion further delay by such an application as the present. *Manning* was stopped by the Court, who asked *Chitty*,

who supported the rule, whether his affidavit stated that the peerage had devolved on the defendant subsequently to the judgment in Ireland; *Chitty* admitted that this was not sworn: but he stated from his own knowledge, that the fact was so, and added, that from the form of the judgment it appeared to be on a warrant of attorney. The Court then desired *Chitty* to direct his argument to the increased delay. On this point he contended that an application to put off a trial on account of the absence of a material witness was a matter of course. The Court, however, said that although there might be cases in which it would be reasonable to postpone the trial of a plea in abatement, yet that in general, where a party puts on the record, a plea unconnected with the merits, he ought to be prepared with evidence to support it; and that the indulgence now prayed for, would be contrary to the spirit of the act of parliament on dilatory pleadings; and they discharged the rule. *Wade and another, executors, &c. v. Birmingham.* Ed. MSS.

(a) See information in the Star-chamber, for arresting the Countess

the proceedings (a). The Court in granting the rule, said that they entertained no doubt as to the defendant's privilege.

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Gurney now appeared to shew cause, but said he would not oppose the rule being made absolute with costs as prayed, provided the defendant would undertake to bring no action. This proposal being acceded to by the Attorney-General, who, with Langslow, was to have supported the rule, the Court pronounced the

Rule absolute.

*Rutland*, 6 Co. Rep. 52 b, 54 a, where it is said, that a *severe* sentence was passed upon the serjeants-at-mace, though it does not appear what that sentence was. No process against a peer containing even a formal *capias*, can be supported; *Couche v. Lord Arundel*, 3 East, 127; *Fortnum v. Lord Rokeby*, 4 Taunt. 668; *Briscoe v. Lord Egremont*, 3 M. & S. 88; and in the *Countess of Huntingdon's* case, 1 Vent. 298, the attorney was committed for suing out such process. In *Davis v. Lord Rendlesham*, 7 Taunt. 679; 1 J. B.

Moore, 410, the Court of C. P. refused to give effect, upon a summary application, to the privilege claimed by a peer of Ireland to be sued by original writ, and not by bill and summons; and in Mr. Taunton's report of this case, the authority of *Briscoe v. Lord Egremont*, is questioned by *Burrough, J.* And see *Earl of Athol v. Earl of Derby*, 2 Lev. 72.

(a) It appeared also by the defendant's affidavit, that the whole debt except 4*l.*, had been received by *Cos* before his bankruptcy.

VICE against the RIGHT HONORABLE ANN MARGARET VISCOUNTESS DOWAGER ANSON.

**ASSUMPSIT** for goods sold and delivered, work and labour, with the common money counts. Plea, non-assumpsit. This was an action brought by the plaintiff, a

*A. pays money for shares in a mine to B., describing*

himself as treasurer of the mine, and receives from persons calling themselves directors, a memorandum purporting that *A.* is a proprietor of shares, and that his name is entered in the cost book. *A.* in writing, and in conversation, acknowledges himself to be a shareholder and receives money from *B.* as treasurer, on account of supposed profits, but no deed is executed, nor is there an assignment of any interest in the mine from the lessee thereof. Held, that *A.* is not liable for supplies furnished the mine, unless furnished on his credit.

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merchant in Truro, to recover the sum of 333*l.* 9*s.*, being 52*l.* 6*s.* 9*d.*, the amount of timber, iron, gunpowder, and other supplies furnished to the mine, Wheal Prudence, between 31st August, 1823, and 7th September, 1824; and a balance of 28*l.* 2*s.* 3*d.*, claimed to be due in respect of supplies furnished to the mine, Wheal Concord, between 1st October, 1824, and 9th March, 1825.

At the trial before Lord *Tenterden*, C. J., at the adjourned sittings at Guildhall, after last Trinity term (*a*), it appeared that *T. J. Alderson* (*b*), describing himself as

(*a*) Counsel for the plaintiff, *Pollock, F.*, and *Chitty*. For the defendant, the *Attorney General* and *Brougham*.

(*b*) The witness having been asked by the plaintiff's counsel, what had become of certain letters written to him by the defendant, on the subject of the mines, and having said that at her request he had given them up to her in 1825, it was proved that notice to produce these letters had been served on the defendant's attorney between seven and eight o'clock in the evening of the preceding Saturday. (The trial took place on Wednesday the 17th October). It appeared that the defendant, though she had a town residence, was, at the time of the service of this notice, in Scotland. It was objected by the *Attorney General*, for the defendant, that this notice was too late. *Pollock* stated, that he recollected that on a similar objection, with respect to papers in Germany, his lordship had ruled that the attorney should be in possession of all the material papers connected with the cause. That was an action of trover for goods, brought after a long period, the party having remained abroad during the greater

part of the war. The action was brought in 1816 or 1817, and on the question with respect to the notice which in that case had been served on the attorney a week or ten days before the sittings, his lordship ruled that the attorney who represented the foreign party, ought to be in possession of those papers. Here Mr. *Leake* does produce some of the papers connected with the cause, and he submitted that defendant should have put him in possession of all those papers likely to be called for, and that the correspondence between the defendant and the witness on this business, formed a sort of paper so likely to be called for, that she should have put her attorney in possession of them. "Lord *Tenterden*, C. J. I have no distinct recollection of that case, but I should decide in the same way now as to all those papers which have a direct bearing on the cause, that all papers relating to the transaction may be reasonably presumed to be put into the hands of the solicitor who is conducting the cause for a person resident abroad. I am not quite sure that rule would hold, or that I should hold it to the

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treasurer of the Wheal Concord Mine, had, in 1822 or 1823, received money from the defendant on account of her shares in the Wheal Concord, that he had conversed with her on the subject of her shares, and that from the time she paid her money, she had made inquiries of him respecting the progress of the mine, and had asked how the concern was going on, and what probability there was of profit? No deed and no assignment of the lease of the mine were ever executed, but upon the purchase of the shares, certificates were issued in the following form:—"Wheal Concord Tin and Copper Mine Company, No. 133. These are to certify that the Viscountess Dowager Anson is the proprietor of the share or number 133, being one share of the Wheal Concord Mine, situate in the parish of St. Agnes, in the county of Cornwall, and that her name is duly registered in the Cost Book of the said mine, subject to the rules, regulations, and orders of the said company, and that the said Viscountess Dowager Anson, her executors, administrators, and assigns, are entitled to the profits and advantages of such share. By order of the Directors. As witness my hand, this 14th day of June, in the year of our Lord 1822. Christopher Vaux, Secretary to the said mine." Similar certificates were issued for the shares in Wheal Prudence, dated 27th February, 1823, and signed, "*Charles Hutton*, Secretary for the mine." Another witness had heard defendant speak of her mine shares. This witness, who was also a shareholder, stated that defendant considered

same extent with regard to a solicitor or attorney conducting a cause for a person residing in England; but it appears to me, that it must be confined to such papers as one may naturally suppose would be placed in the hands of the attorney, with a view to the conduct of the action, whether by the plaintiff or the defendant. The

papers you are asking for, are letters written by the defendant and returned to her. I cannot conceive that it can be reasonably expected that those papers would be placed before hand in the hands of the attorney, and therefore I do not think the case is like that which has been cited." And see *Wood v. Strickland*, 2 Mer. 461.

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herself to have the same interest as the witness ; but neither witness nor defendant had any other document than the certificates above set forth, and stated that she, witness, believed they were all swindled out of their money. *Thomas* was the lessee of the mine, he came down from London, and set workmen to work on the mine. *Thomas* ordered the supplies, and the plaintiff furnished them, and took a steam engine which had been in the mine ever since 1821. Upon this evidence the Attorney General urged to the jury, that as the defendant was not shewn to be interested in the mine, their verdict must be for her.

Lord TENTERDEN, C. J., in charging the jury said, This is an action to recover the amount of a bill, for articles furnished by the plaintiff, to be used on certain mines, called the Wheal Concord and Prudence Mines, in Cornwall. It does not appear by the evidence, that at the time when the plaintiff supplied these articles, he had any knowledge, or any reason to suppose that the present defendant had any interest or concern in those mines, and in that respect his case is like one which was tried here a day or two ago, namely, that the plaintiff cannot by possibility have supplied this upon the personal credit of the defendant, knowing of any interest on her part at the time, because there was not actually any known interest. She has not held herself out to him, or to the world, as a proprietor, or a person interested. But if she be really interested in it, she is chargeable for the supply ; and that brings the case to the question which the Attorney-General has submitted for your consideration, namely, whether this interest can be understood to have been proved ? whether Lady *Anson* had, at the time of these supplies, any interest in these mines ? The supplies are proved to have been made to the mines for the working of them. The partnership, if it was any, is a partnership in that which is of the nature of real property ; it is not what may be commonly called a trading partnership. Now, that Lady *Anson* considered herself to

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have an interest in these mines, is a matter that is not disputed; but if she was mistaken in so considering herself, as that consideration and opinion on her part were never communicated to the plaintiff, and he has not acted in confidence of such consideration and opinion, the defendant's mistake ought not to subject her to this action. We are to look to whether she had an interest, not what she herself thought; her own opinion of her interest, if she had made it known to the plaintiff, and he had acted in confidence of it, would be another thing. We are to look, therefore, to see whether she had an interest; if she had, she is answerable; if she had not, she is not answerable. The history of the mine is left in considerable obscurity; all that we can collect from it, is this, that in the year 1822, or perhaps a little earlier, a person of the name of *Thomas* made his appearance in Cornwall, and took upon himself the management of these two mines, and set persons to work upon them. He is spoken of by one of the witnesses as having been a lessee or tenant, therefore, under some superior person who was the owner of the fee. Whether that was distinctly so or not, does not appear by the evidence. This we collect from the witnesses, that Mr. *Thomas* is a person appearing in Cornwall, as the manager of these mines; that is clear. What interest he may have had in them, is left in doubt; then assuming that he had an interest, is it shewn that he has communicated a portion of that interest to Lady *Anson*? If it appears that he had an interest, and that he has communicated a portion of that interest to Lady *Anson*, she has an interest, and she is liable. If he had no interest, he could have communicated none; if he had an interest, and has not communicated it, still she would have none. Now let us see what he has done upon the evidence, as far as regards Lady *Anson's* acquisition. The name of *Thomas* no where appears, nor does that parchment which has been delivered to her for her money, as giving her an interest in this concern, bear his name upon it, nor is it in any manner proved to have been issued by him, or under his authority;


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and if Lady *Anson* were at this moment to call upon Mr. *Thomas* to account to her for a portion of the profits of the mines, supposing profits had been made, a great deal more must be shewn than this bit of parchment shews before she could recover. Let us read it. "Wheal Concord Tin and Copper Mine Company, No. 133. These are to certify, that the Viscountess Dowager *Anson*, is a proprietor in the share, or No. 133, being one share of the Wheal Concord Mine, situate, &c.; that her name is duly registered in the Cost Book of the said mine, subject to the rules, regulations and orders of the said company. And that the said Viscountess Dowager *Anson*, her executors, administrators, and assigns, are entitled to the profits and advantages of such share." Whether her name was duly registered in the cost book of the mine, does not appear. Then this fact is not proved; if it had been, the registering of the person's name in a book of that kind, will not convey an interest in real property. But by whom is that done—"By order of the directors, as witness my hand, *Christopher Vaur*." Who are the directors? What connexion is there between them and the mines? Who are they? No evidence has been laid before you, as to who these directors are, what right they had to issue this piece of paper, or who Mr. *Vaur* is. You are to say whether, under these circumstances, it is made out to your satisfaction that Lady *Anson* had any interest in these mines; I own it appears to me that it is not made out.

Upon hearing this direction, *Pollock* elected to be nonsuited, and requested the learned judge to give leave to enter a verdict for the plaintiff, if the Court should be of opinion that the defendant, by admitting herself to be a proprietor, had made herself liable. His lordship said, that where a judge entertained no doubt, it was not usual to give such leave.

*F. Pollock*, now moved to set aside the nonsuit. The only question at the trial was, whether the defendant was interested in the mine: as the goods were not furnished

on her credit, she must be shewn to have been interested. [*Bayley, J.* You were bound either to prove that she held herself out as a partner, or that she was actually so.] In *Doe dem. Hanley v. Wood (a)*, it was held, that the interest of parties working a mine amounts only to a licence, and does not therefore, like a legal interest in the soil, require a formal conveyance. It was contended by the Attorney General, and ruled by the learned judge, that it followed necessarily that unless the defendant had some legal interest in the mine, she was not liable. It is submitted that it was sufficient to show participation in working the mine; his lordship thought a conveyance necessary. [*Bayley, J.* A liberty to work, would lie in grant.] The defendant writes to *Denham*, stating that the Wheal Concord mines not being disposed of, is a great disappointment to Lady *Anson*, and that she has no opinion of a concern in which she has been so cruelly deceived. It was proved that *Denham* was a director. [*Lord Tenterden, C. J.* I do not see any evidence of that.] It was admitted that the defendant had bought shares in the mine of *Thomas*. [*Lord Tenterden, C. J.* Would not that depend upon the title of *Thomas*, and whether *Thomas* had conveyed.] What better evidence can be produced against the owner of a ship, than a letter to him from the ship's captain, speaking of his share in the ship; the defendant writes it is not very pleasant to those who have given *Mr. Thomas 50l.* for a five hundredth share, to hear that a thousandth share is now to be had for 20l., but that she will be glad to hear adventurers can be found. The tradesman does not know the internal arrangements. [*Bayley, J.* If the letter had been written to the plaintiff, or he had acted on the letter, that observation would have been material.] *Alderson* sold the shares, who stated that he was agent for the treasurer, and afterwards treasurer himself, and a shareholder, and had conversed with the defendant about

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(a) 2 B. & A. 724. And see 469. Lord *Mountjoy's* case, 4 *Norman v. Roe*, 19 Ves. 158. Leon. 147. Godb. 18. 1 *Ander-Chetham v. Williamson*, 4 East, son, 307. S. C.

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her shares. *Thomas* was lessee of the mines. It must be presumed that she had taken due means to inquire, and that she was satisfied that she had acquired a right either at law or in equity. She speaks of the hardship of having shares multiplied. She ought not to be allowed to say, shew that I am strictly and legally a part owner: [*Bayley, J.* If *Thomas* had ordered supplies "as lessee," would the defendant have been liable?]

LORD TENTERDEN, C. J.—The defendant's letter shews that she thought she had an interest; the piece of parchment shewed that she had no interest. I told the jury that the opinion which the defendant may have entertained, would not entitle the plaintiff to recover, he not having furnished the goods upon that information. I pointed out to them the difference between an ordinary partnership and an interest in a mine.

BAYLEY, J.—*Jane Blackwell* (a) said, she considered herself interested, and that defendant considered that she had the same interest, but she had nothing but a piece of parchment, which when produced does not shew any interest (b).

Rule refused (c).

(a) *Ante*, 115.

v. *Clay*, 14 East, 239.

(b) And see *Alderson v. Clay*,  
 1 Stark. N. P. C. 405. *Newmarch*

(c) See *Dickenson v. Valpy*,  
*post*.

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ROACH and others v. ANN OSTLER, Executrix of  
 WILLIAM OSTLER, deceased.

*A. B.* draws  
 a bill at 30  
 days' sight on  
*A. B.* :—

ASSUMPSIT. The first count of the declaration stated, that the testator, on the 29th October, 1825, in certain  
 Held, that *A. B.*, the drawer, is not entitled to notice of non-acceptance. A letter written by *A. B.*, the drawer, to the payee of the bill, expressing his apprehension that it would be dishonored, coupled with the fact, that the place to which the bill is directed is the usual residence of *A. B.*, the drawer, when in England, is evidence from which a jury may infer the identity of the drawer and drawee.

parts beyond the seas, to wit, Rio de Janeiro, in South America, that is to say, at London, made his certain bill of Exchange in writing, directed to *one William Ostler*, and thereby requested the said *last-mentioned William Ostler*, at 30 days' sight, to pay, that, his the said *William Ostler, deceased's*, first bill of exchange, to the order of *Thomas Russell*, 161*l.* 9*s.* 8*d.*, for value received; and that by a certain memorandum, subscribed to the said bill of exchange, the same bill was also directed, in case of need, to the said plaintiffs, for the said *Thomas Russell*. The declaration then stated an indorsement by the payee to *Brown*, and from *Brown* to *Stilwell*. Averment that *Stilwell*, in the lifetime of testator, and before the payment of the money specified in the bill, to wit, on the 3rd February, 1826, at, &c., caused the said bill of exchange, so indorsed as aforesaid, to be presented and shewn to the said *William Ostler, to whom the said bill of exchange was so directed as aforesaid*, for his acceptance thereof; and that the said *last-mentioned William Ostler* then and there had sight of the said bill of exchange, and was then and there requested to accept the same, according to the tenor, &c., but that the said *last-mentioned William Ostler* did not, nor would, at the said time, when, &c., or at any time before or afterwards, accept the same, but wholly refused so to do, and that, thereupon, afterwards, to wit, on, &c., at, &c., the said *Thomas Stilwell* caused the said bill of exchange to be protested for non-acceptance thereof, and that, thereupon, afterwards, to wit, on, &c., at, &c., the said plaintiffs, for the honour of the said *Thomas Russell*, accepted the said bill of exchange upon the said protest thereof, and that the said *Thomas Stilwell* afterwards, in the lifetime of the said *William Ostler, deceased*, and when the said bill of exchange became due and payable, according to the tenor and effect thereof, to wit, on the 9th day of March, 1826, at, &c., caused the said bill of exchange, so indorsed as aforesaid, to be shewn and presented to the said *William Ostler, to whom the said bill of exchange was so directed as*

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*aforsaid* for payment thereof, and payment of the said sum of money, in the said bill of exchange specified, was then and there demanded of the said *last-mentioned William Ostler*, according to the tenor, &c., but that the said *last-mentioned William Ostler* then and there wholly refused to pay the said sum of money, in the said bill of exchange specified; nor did he, at any time before or afterwards, pay the same, and that, thereupon, afterwards, and in the lifetime of the said *William Ostler, deceased*, to wit, on, &c., at, &c., the said *Thomas Stilwell* caused the said bill of exchange to be duly protested for non-payment thereof, and that, thereupon, the said plaintiffs, upon the said protest, and for the honour of the said *Thomas Russell*, paid the said sum of money in the said bill of exchange specified, together with a large sum of money, to wit, 10*l.*, for the costs of the said protests, and charges attending the non-payment of the said bill of exchange, and noting the same, nevertheless, *the said William Ostler, in his lifetime, the drawer of the said bill of exchange*, and all others whom it might concern, always obliged unto the said plaintiffs for their reimbursement, in due form of law. Of all which premises *the said William Ostler, deceased*, afterwards, in his lifetime, to wit, on, &c., at, &c., had notice. By means whereof the said *William Ostler, deceased*, in his lifetime, then and there became liable to pay to the said plaintiffs the sum of money in the said bill of exchange specified, and the costs of protests and charges so paid by the said plaintiffs as *aforsaid*, for and upon the said bill of exchange, when he the said *William Ostler, deceased*, should be thereunto afterwards requested. And being so liable, &c. The declaration contained two other counts on the bill, and counts for money lent, paid, had, and received, and upon an account stated. Plea, non-assumpsit, and issue thereon.

At the trial before Lord *Tenterden*, C. J., at the sittings after last Trinity term (*a*), upon the formal proof on

(*a*) 19th July, 1827, Counsel for *royd*; for the defendant, *F. Pollock* the plaintiff, *Patteson* and *Hol-* and *Chitty*.

the bill being gone through, it was objected by *Pollock*, for the defendant, that the plaintiff could not recover upon the first count, inasmuch as it was not proved that the testator had notice of the non-acceptance. To which objection it was answered, that the bill was directed to a *William Ostler*, at a place which was proved to be the residence of the testator's wife and family, and of himself when in England (a). The following letter from the testator to the payee was also read :

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*Ship Marquis of Hastings,*  
*Sydney, January 22, 1826 (b).*

My Dear Sir,—Since my arrival here, I have good cause to fear that your bill will not be paid ; and I am truly sorry that I did not more particularly press your very kind

(a) In *Wythers v. Ischam*, Dyer 70, a, b, where in trespass, *quare parvum fregit*, defendant pleaded, as to the breaking and entry, that one John Arundel, Knt., being seised in fee, granted to him, defendant, the office of keeper of the said park ; and as to consuming the grass, that one John Arundel, Knt., (quidam *I. Arundel, miles*), being seised in fee, granted to him the office of parker of the said park, and prescribed for common appendant to the office ; the plea was held to be bad, because the defendant claimed the same office through different grantors. So in *Philip Bickerstaffe et Us v. Percy*, 2 Lev. 207, which was debt upon a judgment, the declaration stated, that *Clarke* recovered 90*l*, and made the plaintiff, *Anne*, his executrix ; and that she took to husband one Philip Bickerstaffe. Defendant pleaded that plaintiffs were never married, and the plaintiffs having demurred to the plea, the Court held the declaration bad.

“ *Car quendam Philippum Bickerstaffe, ne peut estre intend le plaintiff, Philip.*” So in *quare impedit* for a chantry, if the defendant pleads a title to a chantry, of the same name as that mentioned in the declaration, in the said chapel, the plaintiff is entitled to a writ to the bishop, as the plea must be taken to relate to a different chantry. *Per* Paston, in T. 9, H. 6, fo. 17, pl. 8 ; and see Rednesh's case, P. 1 H. 7, fo. 19, pl. 4. In the principal case the declaration seems to be cautiously worded, to exclude any inference of identity. *Quere*, therefore, whether the evidence may not be considered as tending to contradict the declaration ?

(b) This letter appears to have been written before the presentment for acceptance, and of course without knowledge of any laches committed by the holder. See *Goodall v. Dolley*, 1 T. R. 712 ; *Lundie v. Robertson*, 7 East, 231, 233 ; S. C. 3 Smith, 225.

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offer, of desiring your agents to hold the bill for a little time. Should you have done so, I shall ever feel most truly thankful. Should, however, the bill be returned to you, let it be immediately transmitted back, when, I assure you, it will meet with payment and costs; and I beg of you not to suffer an improper feeling to be formed against me on the occasion.

T. Russell, Esq.  
 Rio de Janeiro.

I remain, &c.  
 W. OSTLER.

Upon this evidence a verdict was found for the plaintiff, upon the first, fourth, and subsequent counts, and for the defendant, on the second and third counts, with liberty for the defendant to move to enter a nonsuit.

*F. Pollock*, now moved accordingly, upon the objection taken at the trial. Notice of non-acceptance was necessary, considering the testator as standing merely in the relation of drawer of this bill. It was contended at the trial, that the testator's letter of the 22d January, 1826, coupled with evidence of his place of abode in England, was sufficient to shew that the testator had drawn this bill upon himself. But such evidence was clearly insufficient; for no sum was mentioned in the letter, nor was there any evidence to connect that letter with the bill in question.

The Court said, that there was evidence for the jury that the testator was the drawee of the bill; which must, therefore, be considered as a mere promissory note, the maker of which would not be entitled to notice.

Rule refused (a).

(a) If the allegations in the declaration left the question of identity or non-identity indifferent, the doubt seems to be removed by the evidence. If the declaration be considered as distinctly asserting the non-identity of the drawer and

drawee (*ante*, note (a.)) or as presenting a patent ambiguity, the objection, supposing the general allegation of notice after the second protest (for non-payment), to be insufficient, would be on the record.

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7 B. &amp; C. 410

**ASSUMPSIT.** The first count stated, that on the 23rd November, 1813, the defendant made his promissory note in writing, and thereby promised to pay, *ten days after sight thereof*, to the plaintiff or order, 250*l.*, with interest at the rate of *two and a half* per cent. per annum, *to the day of acceptance*, whereby defendant became liable to pay, &c. Averment, that the said note was afterwards, to wit, on the 14th day of May, 1825, duly presented to the defendant, who then and there had sight thereof, and then and there paid to the said plaintiff interest on the said sum, to the 23rd November, 1824, and in consideration of the premises, undertook to pay the said sum and interest thereon, from the day and year last aforesaid, according to the tenor and effect of the said note. 2nd count, a similar note payable with *three* per cent. interest, whereby, &c. Averment of presentment, and that defendant paid interest on the note, at the rate therein mentioned, to the 23rd day of November, 1823. And in consideration of the premises, defendant undertook, &c., to pay plaintiff the said last-mentioned sum and interest thereon, from the day and year last aforesaid, at the rate of *two and a half* per cent. per annum. The third count stated, the making of the note and the payment of the interest, as in the second, and then averred, that the defendant, without the request or authority of the plaintiff for that purpose, altered the note by striking out the word "three," and inserting instead thereof the words "two and a half," and thereby made the same to appear payable with interest at the rate of two and a half, instead of three per cent. per annum. And in consideration of the premises, defendant undertook, &c., to pay plaintiff the said last-mentioned sum, and the future interest thereon, at the

ance" in such an instrument means "demand;" and as the maker has no option to exercise, the note need not be left with him for acceptance.

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A. deposits money with B., a banker, on the terms of having a deposit note, by which B. shall engage to pay the principal, at ten days' sight, with three per cent. interest, until the day of acceptance. A note is given accordingly. On receiving interest on this note, A. is told that B. cannot afford to pay more than two and a half per cent. in future, and "three" is struck out, and "two and a half" inserted instead.—Held, that the payment of interest is evidence to shew that a principal sum corresponding with, and bearing such interest, was due; and that the note may be looked at to see the terms on which the deposit was made. The term "accept-



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rate last aforesaid. The fourth count differed from the third, by omitting the allegation, that the alteration was made without the request or authority of the plaintiff. The fifth count was wholly silent as to any reservation or payment of interest. The sixth count stated a reservation of interest at three per cent., and a presentment for acceptance; that in consideration of the premises, defendant undertook, &c., to return the note to plaintiff, after having sight thereof, in the same state and condition in which the note was at the time it was so delivered to the defendant, and not to alter the same in any material respect without the previous request or authority of plaintiff for that purpose; yet defendant not regarding, &c., did not nor would return the note to plaintiff, after having had sight thereof as aforesaid, in such state and condition as aforesaid, but wholly refused and neglected so to do; and, on the contrary thereof, afterwards, to wit, on, &c., at, &c., without the previous request or authority of plaintiff for that purpose, wrongfully altered the note, by striking out the word "three," and inserting instead thereof, the words "two and a half;" and thereby made the said last-mentioned note to appear to be payable with interest, at the rate of "two and a half," instead of "three" per cent. per annum, whereby plaintiff hath been hindered and prevented from obtaining payment of the last-mentioned sum, with interest at the rate of three per cent. per annum, according to the tenor and effect of the last-mentioned note, which is still wholly unpaid to plaintiff, to wit, at, &c. The declaration contained counts for money lent, money paid, money had and received, interest, and upon an account stated. The defendant pleaded *non assumpsit*, and *actio non accrevit infra sex annos*.

At the trial before *Best*, C. J., at the last Hants assizes (a), it appeared that in the year 1813, when the note was given,

(a) Counsel for the plaintiff, and Manning; for the defendant, *Mercwether* and *E. Lawes*, Serjts., *Williams*, C. F., and *Bayly*.

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defendant carried on business as a banker, in partnership with two persons, of the names of *Trim* and *Kellow*. Plaintiff deposited 250*l.* with the bank, on the 3d November, 1813, and at the same time received the banker's deposit note declared on, which then purported to bear interest at the rate of three per cent. to the day of acceptance. It was stated by the clerk who received the money, that it was deposited on the terms of the note. In 1819, the defendant retired from the bank, and was succeeded by *Pritchard*, who continued the business in partnership with *Trim* and *Kellow*, till 1823, when *Trim* died, and afterwards with *Kellow* alone, who had since died insolvent (a). On the 14th May, 1825, plaintiff called at the bank for payment of his interest, which had not been before demanded since the note had been given in 1813. *Pritchard* carried the note over to defendant, who desired *Pritchard* to pay the interest; whereupon *Pritchard* returned to the bank, and paid the interest up to the preceding November, but told plaintiff that they could not afford to continue paying three per cent. interest, and asked him to accept in future two and a half. Plaintiff not having expressly objected to this proposal, *Pritchard* altered the note, by striking out three and writing over it two and a half, and then returned the note to the plaintiff. In January last, *Bell*, clerk to *Clement*, plaintiff's attorney, called on defendant at his house, shewed him the note, and said he came on behalf of plaintiff to demand payment of 250*l.*, deposited by him with *Trim* and *Toomer* at the date of the note, and the interest thereof at three per cent; that he would call on him again in thirteen days, for the principal and interest: he then made a similar demand at two and a half per cent. Defendant then requested that the note should be left, and said that the usual course was to leave it for a day, and that unless that were done, and it was so left, he would have nothing to do with it. *Bell*

(a) A former action had been ed the nonjoinder of *Toomer*. brought against *Kellow*, who plead-

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refused to part with the possession of the note, but offered to read it to defendant. Upon this evidence it was contended, on the part of the defendant, that the plaintiff could not recover, first, because the note was void for want of a new stamp upon the alteration in the rate of interest; and secondly, that the note ought to have been left for acceptance. The learned Judge overruled these objections, and directed a verdict for the plaintiff for principal, and for interest, from Nov. 1824, at two and a half per cent., giving to the defendant leave to move the Court for a rule to enter a nonsuit on the last objection, if, on reflection, his counsel should think the objection tenable (a).

*C. F. Williams* now moved for a nonsuit on the ground of non-acceptance, and for a new trial on the objection to the stamp. Upon the first point he urged, that the special contract between these partners rendered an acceptance necessary before payment of the note could be demanded. Here there was no acceptance, and no opportunity to accept, inasmuch as the person who brought the note refused to allow it to remain for the usual time. Upon the other point, the money was deposited distinctly on the terms of the note. It was, therefore, from the note only that the Court could collect the terms on which the money had been deposited; but the plaintiff by consenting to alter the note had made it evidence of a new contract, which required a new stamp, without which it was not admissible in evidence for any purpose (b).

Lord Tenterden, C. J.—In using the term “acceptance,” the banker must be taken to have meant demand. He could not have refused to accept his own note (c). He had no business to say, “leave the note for acceptance

(a) As the want of an acceptance could not have affected the demand for interest, there would have been a difficulty in directing a nonsuit to be entered

(b) *Res v. Gillson*, 1 Taunt. 95. *Rapp v. Allnutt*, 15 East, 601; and see *Hawkins v. Warre*, 5 D. & R. 512; 3 B. & C. 690, S. C.

(c) *Ante*, 124, *Roach v. Ostler*.

I should be very sorry to suppose, that bankers meant to require acceptances, in the usual sense of that word, upon notes of this description. The note was originally on a valid stamp, and though its validity is now destroyed, may it not be read to shew upon what terms the money was received? The plaintiff could not recover upon this instrument; but the subscribing witness proved an advance of money upon the terms mentioned in a paper, which was then properly stamped. The plaintiff consented to an alteration for the defendant's benefit. His security for the two and a half per cent. interest is invalid. That does not destroy the plaintiff's remedy for his original demand, or prevent the paper's being given in evidence to shew what was the original contract.

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BAYLEY, J.—The note was originally valid, but lost its operation by a subsequent act, which would make it void, except for the purpose of shewing upon what terms the money was received (*a*). But, independently of the note, we find that interest was paid; which would shew that a principal sum was due, in reference to which the interest was paid. The original contract was, to pay the principal, and interest at the rate of three per cent. They are willing to take two and a half. It seems to be considered, that the alteration of the note destroyed the original debt; but though the parties entered into a second contract, which was void, it does not follow that the first contract is extinguished (*b*). A contract to pay and receive usurious interest upon a debt already existing, does not destroy the debt (*c*). It was competent to the Court to look at the instrument (*d*) for the collateral purpose of ascertaining the terms on which the deposit was made.

Rule refused (*e*).

(*a*) Vide *Forsyth v. Jervis*, 1 Stark. N. P. C., 437.

(*b*) *Robson v. Hall*, Peake, N. P. C., 127, S. P.

(*c*) *Ferrall v. Shaen*, 1 Saund. 292, and the cases cited, 295, *in notis*; *Beete v. Bidgood*, *post* 143, 156.

(*d*) *Res v. Pendleton*, 15 East, 449.

(*e*) And see *French v. Patten*, 9 East, 351; *Fairlie v. Christie*, 7 Taunt. 416, 1 J. B. Moore, 114; Holt's N. P. C., 331, S. C.; *Stoveld v. Eade*, 4 Bingh. 81.

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DEARDEN and others, against BINNS.

A bond conditioned for the payment of money and interest, and also for the performance of collateral acts, requires only the ad valorem stamp, appropriated to the principal sum, where that stamp exceeds the 1*l.* 15*s.*, which the collateral matter would require if it stood alone.

**DEBT** on bond, dated 19th December, 1823. On oyer the bond appeared to be the joint and several obligation of *Kershaw*, the defendant, and *Harrop*, to the plaintiffs, *trustees of a certain society* established at the house of Mr. *Melling Woolley*, in Stayley Bridge, in 400*l.*, solvend: to plaintiffs, their certain, &c.: and the condition appeared to be, that if *Kershaw*, his heirs, &c., or any of them, shall and do well and truly pay unto the plaintiffs, or any of them, their, or any of their successors, executors, &c., the full sum of 200*l.*, being money advanced by the members of the said society, with lawful interest for the same, for the use of the members of the society, by the payment of instalments of 2*l.* 8*d.* on each and every monthly day of meeting of the members in the year, and make the first payment on the next monthly day of meeting, and also shall and do continue to make the payment on the successive monthly days as aforesaid, until the sum of 200*l.* and interest, upon the whole sum throughout the time aforesaid, shall be fully paid and satisfied, without fraud, &c., and also shall well and truly observe and perform the rules and orders belonging to the said society, then, &c. The defendant pleaded, first, *non est factum*. The second plea set out the rules of the society, and averred payment of the monthly contribution, and of all penalties, &c., and security given in respect of *chances*, as required by the condition. Third plea, that before the making of the supposed writing obligatory, to wit, on the 19th December, 1823, at, &c., it was corruptly, and against the form, &c., agreed by and between the plaintiffs and *Kershaw*, that plaintiffs should lend and advance to *Kershaw*, 200*l.*, and that the plaintiffs should forbear, and give day of payment thereof to *Kershaw* in the manner following, that is to say, until the said sum of 200*l.*, with interest for the same, at the rate and in manner hereafter mentioned, should be fully

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paid by *Kershaw* to plaintiffs, by the instalments of 2*l.* 8*d.* at each and every monthly day of meeting, the first of the said payments to be made on the next monthly day of meeting of the said society following the said agreement; and that *Kershaw*, for the loan of the said sum of 200*l.*, and for giving day of payment thereof as aforesaid, for the time aforesaid, should give, and pay to plaintiffs, more than lawful interest, at and after the rate of 5*l.* per cent. per annum on the sum of 200*l.*, that is to say, that *Kershaw* agreed to pay to plaintiffs, and plaintiffs agreed to accept and receive from *Kershaw*, on account of the sum of 200*l.* and interest, the respective monthly instalments of 2*l.* 8*d.* on the successive days aforesaid, until the full sum of 200*l.*, together with interest at the rate of 5*l.* per cent. per annum, upon the whole of the said sum of 200*l.* throughout the time aforesaid should be fully paid and satisfied, and that for securing the repayment of the sum of 200*l.*, and interest on the whole of the sum of 200*l.* throughout the time aforesaid, by instalments as aforesaid, to plaintiffs, the defendant, together with *Kershaw*, and *Harrop*, should become bound to the plaintiffs, in the penal sum of 400*l.*, conditioned that *Kershaw*, his heirs, &c., should pay unto plaintiffs, or any of them, their or any of their successors, executors, &c., the sum of 200*l.*, together with interest at the rate aforesaid, by the said instalments, and continue to pay the said instalments, until the said sum of 200*l.*, and interest upon the whole of the said sum throughout the time aforesaid, should be fully paid and satisfied. Averment, that in pursuance of the corrupt and unlawful agreement made as aforesaid, plaintiffs, afterwards, to wit, on the said 19th December, in the year 1823, at, &c., lent and advanced to *Kershaw*, the said sum of 200*l.*, and that for securing the repayment thereof, to the plaintiffs, together with interest upon the whole of the said sum, throughout the time aforesaid, by monthly payments, as aforesaid, defendant, and also *Kershaw* and *Harrop*, in pursuance of the said corrupt, &c., then and there, to wit,

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on, &c., at, &c., made and sealed, and as their joint and several act and deed, delivered to plaintiffs the said writing in the said declaration mentioned, and plaintiffs then and there accepted and received the said writing with the said condition thereunder written, of and from defendant and *Kershaw* and *Harrop*, in pursuance of the said corrupt, &c., and for the purpose aforesaid; and that the interest so agreed to be paid as aforesaid, and reserved and made payable to plaintiffs, by the said condition of the said writing as aforesaid, exceeds the rate of 5*l.* for the forbearing and giving of day of payment of the 100*l.*, for one year, contrary to the form, &c., by means whereof, and by force, &c., the said writing was, and is wholly void in law; concluding with verification, and prayer of judgment. Fourth plea, that before the making of the supposed writing obligatory, and also at the several times hereinafter next mentioned, *Kershaw* was a member of the said society, and that afterwards, to wit, on the seventh January, 1824, at, &c., at a monthly meeting of the said society, *Kershaw*, in respect of a certain chance or share of the said *Kershaw* in the subscription fund in the said rules and orders mentioned was declared to be the highest bidder for, and entitled to one of the said shares of 50*l.* in the said rules and orders mentioned at or for the price or sum of 7*l.* 10*s.*, and that afterwards, to wit, on the 4th February, 1824, at, &c., at another monthly meeting of the said society, *Kershaw*, in respect of two other chances or shares of said *Kershaw*, in the said subscription fund, was declared to be the highest bidder for, and entitled to two other shares of 50*l.* each, at or for the price or sum of 14*l.* 12*s.*; and that afterwards, to wit, on the 7th April, 1824, at, &c., at another monthly meeting of the said society, the said *Kershaw*, in respect of one other chance or share of the said *Kershaw*, in the said subscription fund, was declared to be the highest bidder for, and entitled to one other share of 50*l.*, at or for the price or sum of 8*l.* 2*s.*, which sums of 7*l.* 10*s.*, 14*l.* 12*s.*, and 8*l.* 2*s.*,

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make together the full sum of 30*l.* 4*s.* ; and that after the respective times last aforesaid, to wit, on, &c., at, &c., it was corruptly, and against the form of the statute in that case made and provided, agreed by and between plaintiffs and *Kershaw*, that the said plaintiffs as trustees of the said society, should lend and advance to the said *Kershaw*, the sum of 169*l.* 16*s.*, on account of the said four shares of 50*l.* each, to which *Kershaw* was so declared to be entitled, as last aforesaid, and that the said plaintiffs should forbear and give day of payment thereof to *Kershaw*, in manner following (that is to say), until the said sum of 169*l.* 16*s.*, together with the additional sum of 30*l.* 4*s.* making together the full sum of 200*l.* with interest on the said last-mentioned sum of 200*l.*, at the rate and in manner hereinafter mentioned, should be paid by *Kershaw*, to the said plaintiffs, by certain instalments of 2*l.* 8*d.* at each and every monthly day of meeting of the said society, the first of the said payments to be made on the next monthly day of meeting of the said society, following the said last-mentioned agreement, and that for the loan of the said sum of 169*l.* 16*s.*, and for giving day of payment thereof, as last aforesaid, *Kershaw* should give and pay to the said plaintiffs, more than lawful interest, at and after the rate of 5*l.* per cent. per annum, on the said sum of 169*l.* 16*s.*, (that is to say), the said sum of 30*l.* 4*s.*, making together with the said sum of 169*l.* 16*s.* so to be lent and advanced by the said plaintiffs to the said *Kershaw* as aforesaid, the sum of 200*l.* in the said condition of the said supposed writing obligatory mentioned ; and also, that *Kershaw* should give and pay to the said plaintiffs the said respective monthly instalments of 2*l.* 8*d.* on the successive days last aforesaid, until the said full sum of 200*l.* last mentioned, together with interest at the rate of 5*l.* per cent. per annum, upon the whole of the said sum of 200*l.*, throughout the time last aforesaid, should be fully paid and satisfied, and that for securing the payment of the said last mentioned sum of 200*l.*, and



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interest on the whole of the said sum of 200*l.*, throughout the time last aforesaid, by the instalments last aforesaid to the said plaintiffs, he the said defendant should make and seal, and as his act and deed deliver to the said plaintiffs, a certain writing obligatory, to be dated the 19th December, 1823, and should thereby bind himself in the penal sum of 400*l.*, conditioned for payment, by *Kershaw*, his heirs, executors, or administrators, or any of them, unto the said plaintiffs, or any of them, or any of their successors, executors, administrators, or assigns, of the said sum of 200*l.*, together with interest thereon at the rate aforesaid, and for *Kershaw*, his heirs, executors, or administrators, continuing to pay the said instalments until the said last mentioned sums of 200*l.*, and interest upon the whole of the sum throughout the time last aforesaid, should be fully paid and satisfied. Averment, that in pursuance of the said corrupt and unlawful agreement, so made as last aforesaid, the said plaintiffs, as trustees as aforesaid, afterwards, to wit, on, &c., at, &c., lent and advanced to *Kershaw*, the said sum of 169*l.* 16*s.*; and that for securing the repayment thereof, together with the said sum of 30*l.* 4*s.*, making together the sum of 200*l.*, and interest at the rate of 5*l.* per cent. per annum, on the whole of the said last mentioned sum of 200*l.* throughout the time last aforesaid, by monthly payments, as last aforesaid, he the said defendant in further pursuance of the said last mentioned corrupt and unlawful agreement, then and there made and sealed, and as his act and deed delivered to the said plaintiffs, the said writing in the said declaration mentioned, and the said plaintiffs then and there accepted and received the said writing, with the said condition thereunder written, of and from him the said defendant in pursuance of the said last mentioned agreement, and for the purpose last aforesaid. And that the said sum of 30*l.* 4*s.*, so agreed to be given for the loan of the said sum of 169*l.* 16*s.*, and the said interest so reserved and made payable to the said plaintiffs,

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by the said condition of the said writing as last aforesaid, exceed the rate of 5*l.*, for the forbearing and giving day of payment of 100*l.* for one year, contrary to the form of the statute, &c. By means whereof, and by force of the said statute, the said writing was and is wholly void in law; conclusion, as in third plea. The replication assigned a breach of the condition, by non-payment of the 200*l.* and interest, and took issue upon the corrupt agreements alleged in the third and fourth pleas. The rejoinder took issue on the non-payment. At the trial before *Hullock*, B., at the last assizes for the county of Lancaster (a), the bond was produced and proved; but it appearing that it bore a 2*l.* stamp only, which is the stamp proper for a bond conditioned for securing the payment of a sum not exceeding 200*l.*, and it being objected that the operation of the bond extended beyond securing a sum of 200*l.*, that point was reserved to the defendant. The jury negatived the payment of the 200*l.* and interest, and the several corrupt agreements, and assessed the plaintiffs damages under the statute (b).

*F. Pollock*, now moved according to the leave reserved. The objection on the Stamp Act is, that by this instrument more is secured than the payment of 200*l.* and legal interest. *Kershaw* was to pay 10*l.* per annum interest during the whole time, notwithstanding the principal would be gradually diminished by the monthly payments of 2*l.* 8*d.* It appeared at the trial, that such was the calculation upon which the parties proceeded (c). Another objection to the sufficiency of the

(a) Counsel for the plaintiffs, *Cross*, Serjt. and *Parke*; for the defendant, *F. Pollock* and *Starkie*.

(b) 8 & 9 W. III., c. 11.

(c) It has been said, that a specialty cannot be avoided by usury appearing in evidence, or upon the face of the condition, but it must

be pleaded; 1 Hawkins, P. C. 248, s. 20; 1 Curwood's Hawkins, 621, s. 63; Comyn, on Usury, 210; and if this be law, it follows that in the principal case the defendant could not avail himself of usury apparent on the condition, although he pleaded the usury, his plea of

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stamp is, that there cannot be appended to a money bond a collateral stipulation, without an additional stamp, particularly where the further provision appears to relate to the payment of money; here the surety might be made responsible for the payment of the monthly contributions,

usury being rendered unavailable by the verdict of the jury, which negated the alleged corrupt agreement. Hawkins cites no authority, but he possibly had in view the case of *Dande v. Currer*, 1 Siderfin, 285, in which the *marginal note* is, "Although it appear that more money is paid than the statute allows, still the party ought to plead the usurious contract, and not demur." But the case at large is literally this: "On demurrer in debt on articles, it appeared that money was lent, ss. 500*l.*; and the articles were dated 8th March, to be paid at such a time, and in the mean time to pay interest 15*l.* (at the then legal rate of 6 per cent.) half-yearly, from the November preceding, and upon that the other demurs; and it was now shewn for cause, that by the declaration it appears that the contract is usurious; but, on the other side, it was said that it ought to have been pleaded, *quod corruptè agreatum fuit*, &c., to the intent that they might have an answer to it. But upon reading the articles, it was, "Whereas money was lent," which might be in November or before; for which reason (*pur que*) judgment for the plaintiff:" 2 Keb. 35, S. C. That Serjeant Hawkins may have been misled by this note appears less improbable, as even Serjeant Williams, (1 Wms. Saund. 295 a), notwithstanding his usual accuracy, refers to this case,

as supporting the proposition of Hawkins. The case is also cited by Comyn *ubi supra*, in confirmation of the same doctrine. He, however, refers also to *Geary v. Swaine*, 1 Lutw. 464, & 3 Salk. 391; *Whelpdale's* case, 5 Co. Rep. 119; *Hamberton v. Horogil*, Hobart, 72. The last two cases merely shew that an obligor cannot, under *non est factum* pleaded to a money bond, shew that the contract was usurious, and that *therefore* the sealed writing is not his deed. The case of *Geary v. Swaine*, decides that a contract appearing in the condition of a bond, whereby the obligor is to pay the principal and 10*l.* per cent. over, if the obligee shall be alive at the end of half-a-year, and that if he die in the interim, the principal and interest shall be lost to the obligee, is not so *conclusively* usurious as to entitle the defendant to demur, and thereby oust the plaintiff of the opportunity of explaining the transaction in his replication. Besides which, the reporter states that two of the Judges thought it was not usury, and that the others said nothing upon that point. The notice of the case in *Salkeld*, seems to be a short and inaccurate abstract of part of the report in *Lutwyche*. And see *Buckley v. Guilbank*, Cro. Jac. 677; 2 Roll. Rep. 414, *post* 155. In the principal case, the objection seems to resolve itself into this: Although the defendant may be pre-

which *Kershaw*, as a member of the society, was liable to make. [*Littledale*, J. If the money part were left out, the bond would require a 35s. stamp (a). *Bayley*, J. We are to say what would be the construction of the bond at the time it was executed: your objection would rather shape itself into this, that more than five per cent. was reserved].

Lord TENTERDEN, C. J.—I cannot satisfy myself that this stamp was not sufficient.

The other Judges concurring,

Rule refused (b).

cluded from availing himself of the defence of usury, which the jury have negatived, and although the Court may have no power to infer such a defence from the terms of the instrument, yet, if the parties have clearly reserved to themselves 200*l.*, and interest beyond 5*l.* per cent., the Court are not precluded from seeing that a stamp which will barely cover 200*l.* and interest at

5*l.* per cent., is insufficient for the purpose.

(a) 55 *Geo.* 3, c. 184, sched. part 1, p. 508, "Bond in England, or personal bond in Scotland, of any kind whatever, not otherwise charged in this schedule, nor expressly exempted from stamp duties, 1*l.* 15s."

(b) And see *Becte v. Bidgood*, post 143; *Solarte v. Melville*, post.

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DOE, on the demise of WESTMORELAND and others, and also of PERFECT and others v. SMITH.

THIS was an action of ejectment brought to recover the possession of certain messuages in the parish of Kippax, in the county of York.

At the trial at the last assizes for the county of York, before *Bayley*, J. (a), it appeared, that the defendant had entered upon the premises under an agreement for a lease, and that since his entry, he had paid rent to the landlord, agreeably to the terms of the intended lease. A writ of

Where *A*, having entered into an agreement for a lease, has been let into possession and has paid the stipulated rent, a tenancy from year to year is created, which the sheriff may sell under a *fi. fa.* against *A*.

which the sheriff may sell under a *fi. fa.* against *A*.

(a) Counsel for the plaintiff, *Jones*, serjeant, *Milner* and *Pat-*  
*teson*; for the defendant, *F. Pol-*  
*lock* and *Parke*.

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*f. fa.* having issued upon a judgment confessed by the now defendant to *Perfect* and Co., a bill of sale was executed to the judgment creditors by the chief bailiff of the honor of Pontefract and his deputy, to *Westmoreland* and Co., the first lessors of the plaintiff, by the direction of *Perfect* and Co., the judgment creditors, who were the second lessors of the plaintiff. It was objected, on the part of the defendant, that when there is an agreement or equitable interest for a term of years, there can not be such a tenancy from year to year as can be seized by the sheriff.

By the direction of the learned Judge, a verdict was found for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

*F. Pollock*, now moved accordingly. It was admitted on the trial, that the equitable interest upon an agreement for a lease could not be seized by the sheriff (*a*); but it was insisted that payment of rent was evidence of a tenancy from year to year. On the part of the defendant, it is contended that the rule does not prevail where it is shewn to be a payment under an agreement; and that, under such circumstances, a tenancy at will only is created. Although a tenancy exists as between landlord and tenant, it is not so for all purposes.

BAYLEY, J.—Could not the landlord bring an action of debt?

The other Judges concurring,

Rule refused (*b*).

(*a*) *Scott v. Scholey*, 8 East, 467; *Metcalf v. Scholey*, 2 N. R. 461.

(*b*) And see *Mann v. Lovejoy*, 1 R. & M. 355; *Hamilton v. Stead*, 5 D. & R. 206, 3 B. & C. 478, S.C.



## The KING against WILLIAM LONG.

UPON an information laid against the defendant, under 52 Geo. 3. c. 93, for using a dog and a gun, at Dirham and Hinton, in the county of Gloucester; a conviction was drawn up in the following form.

"County of Gloucester? Be it remembered, that on the fifth to wit, 1827. 5 day of October, in the year of our Lord, 1827, at Old Sodbury, in the said county of Gloucester, *William Long*, of Dirham and Hinton, in the said county, was duly convicted by us, for keeping and using, within three calendar months, now last past, to wit, on the eleventh day of August, in the year of our Lord aforesaid, at Dirham and Hinton aforesaid, a dog and a gun, for the purpose of taking and killing game, without having obtained such certificate as is directed by the statute in that case made and provided, in order to an assessment for the year in which the said *William Long* did so use such dog and gun, and adjudged to pay the sum of ten pounds for his said offence.

The Court will not grant a *certiorari* to remove a conviction under 52 Geo. 3. c. 93, for using a dog and gun without a certificate, on the ground that jurisdiction does not appear on the face of the conviction, without an affidavit, negating the jurisdiction. Costs of shewing cause against a rule in the first instance are never given.

Given under our hands and seals, being justices of the peace for the county of Gloucester; and also commissioners acting in the execution of the acts relating to assessed taxes, for the district of Greenbaldash, in the said county of Gloucester.

THOMAS BROOKES, L. S.  
FIENNES TROTMAN, L. S."

By the 13th rule of schedule L. (a), it is provided, that "it shall be lawful for any two commissioners for executing this act, or for any one justice of the peace of the county, riding, or division, or the shire or stewartry, or for any city, borough, liberty, or place, wherein any offence or offences aforesaid or described in this schedule, shall be committed, such justice being also a commissioner for executing this act; and he and they is and are hereby

(a) Of 52 G. 3, c. 93.

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required, upon information or complaint to him or them made, of any such offence or offences *committed within the district where he or they shall act as such commissioner or commissioners (a)*, within three calendar months after the offence shall be committed, to summon the person or persons accused, and also the witnesses on either side, to appear before him or them, and upon the appearance of the person or persons accused, or in default of their appearance according to such summons, to proceed to hear and determine the matter in a summary way; and upon due proof made thereof, either by the voluntary confession of the person or persons accused, or by the oath of one or more credible witness or witnesses, to give judgment for the penalty or penalties, or for such part thereof, to which part thereof the said commissioners or justice shall think proper to mitigate the same, and the same not being in any case mitigated to less than one moiety of the said penalty or penalties.

*Campbell* now moved for a *certiorari* to remove the above conviction into this Court. Want of jurisdiction appears on the face of this conviction. A form of conviction is given by the statute; and on the other side it is meant to be said that the justices have pursued that form. The form requires the offence to be stated, and in stating the offence, the jurisdiction would necessarily be shewn. The *certiorari* is taken away (b) only where there is jurisdiction. [*Bayley, J.* A conviction by magistrates, I believe, is no defence in trespass where there is no jurisdiction (c)]. In *Rex v. The Justices of Somersetshire (d)*, it was held, that the *certiorari* was not taken away, because the justices of petty sessions had no jurisdiction *per*

(a) See *Rex v. Edwards*, 1 East, 278; *Rex v. Hazell*, 13 East, 139; *Rex v. Chandler*, 14 East, 267; *Kite's case*, 2 D. & R. 212; S. C. 1 B. & C. 100, and the note, p. 107; 7 & 8 Geo. 4. c. 29, s. 71.

(b) By s. 15 of 52 G. 3, c. 93; and

see *Rex v. Allen*, 15 East, 333; *Rex v. Inhabitants of St. Alban's*, 5 D. & R. 538; 3 B. & C. 698, S.C.

(c) *Vide Gray v. Cookson*, 16 East, 13.

(d) 8 D. & R. 733; 5 B. & C. 816. S. C.

*saltum*. [Bayley, J. There was there no color for saying that the act was done in pursuance of the statute. It may be that the magistrates have no jurisdiction, or that, having jurisdiction, they have omitted to set it forth. The defendant should shew by affidavit that there was no jurisdiction]. That may be done even where jurisdiction appears on the face of the conviction. Suppose the persons who convict had not called themselves magistrates at all, would it have been necessary to produce an affidavit, stating that A. B. and C. D., who merely described themselves as esquires on the face of the conviction, were not justices or commissioners? Clearly not. Here it is not said that they were commissioners within the district. There is a material distinction between an order and a conviction. If any doubt exists, it will be better to grant the *certiorari*, and discuss any objections to it upon the return.

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*Chilton, contra*, who was to have shewn cause in the first instance, was stopped by the Court.

BAYLEY, J.(a)—In the absence of doubt, it would not be right to suffer parties to incur the expense of a further discussion. The statute directs that no "conviction of such commissioners, or justice, shall be removable, by any process whatever, into any other court." The object of the legislature was to avoid those questions which might be raised in this Court upon a *certiorari*. Now, if the conviction were removed by *certiorari* into this Court, it would be competent to the party convicted to take the objection which has now been urged. In other cases, where the want of jurisdiction is shewn by affidavit, the rule as to the *certiorari* being taken away, does not apply. If it were made out by affidavit, that the place where the offence was committed was not within the district, I should say that a *certiorari* ought to issue.

HOLROYD, J.—Concurred.

Rule refused.

(a) Lord Tenterden, C.J., and Littledale, J., were absent.



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*Chilton* applied for the costs, on the ground of being brought here to oppose the rule by a notice of the intended application.

BAYLEY, J.—Costs are never given upon shewing cause against a rule in the first instance.

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A defendant under terms of taking short notice of trial for the sittings in Middlesex, after a non-issuable term, cannot move to change the venue into the country upon the common affidavit.

**GEORGE** moved to change the venue from Middlesex to Shropshire, on the usual affidavit, but stated that the defendant was under terms of pleading issuably, and *taking short notice of trial for the sittings after this term*. In *Tidd*, 628 (a), it is said, that a defendant cannot move to change the venue after an order for time to plead, where the terms are, to plead issuably, and take short notice of trial *at the first or other sittings within term*, in London or Middlesex; because a trial would by that means be lost.

Lord TENTERDEN, C. J.—This would be in violation of the undertaking which the defendant has given. If the cause is tried at the sittings after this term, the plaintiff may have his judgment in Hilary term; whereas, if the venue is changed, he cannot have it till Easter term. The passage

(a) 7th edition; 8th edition, 658. In *Shipley v. Cooper*, 8 T. R. 698, it is stated that the Court made absolute a rule to discharge a rule which had been obtained for changing the venue, where the defendant was under terms of taking short notice of trial for the first sittings *after term*. From the marginal and referential notes to that case, it would seem, however, that it was the first sittings in term for which the undertaking had

been given. The restriction, real or apparent, of this rule to sittings in term, may have arisen either from not adverting to the difference between an issuable and a non-issuable term, or from the peculiar importance which appears to have formerly attached to a trial *in term*, the loss of which only it was that entitled a plaintiff to require that a bail bond, or an attachment against the sheriff, should stand as security.

referred to is affirmative only, and the reason given applies to the present case.

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LITTLEDALE, J.—The defendant can change the venue only upon laying special grounds before the Court.

Rule refused.

BEETE v. BIDGOOD.

THIS cause was tried before the Lord Chief Justice Abbott, in London, at the sittings before Michaelmas term 1826, when the jury found a verdict for the plaintiff, damages 4,238*l.*, subject to the opinion of this court on the following case.

The declaration was upon a promissory note, of which the following is a copy:—

“London, 10th March, 1821.

“On the 1st July, 1825, we promise to pay to *Joseph Beete*, Esq., his executors or administrators, at the house of Messrs. *Sandbach, Tinne, and Co.*, of Liverpool, the sum of three thousand nine hundred and sixty-eight pounds, for value received, in second instalments, with interest included, as expressed and specified in agreement for the sale of his moiety in plantation Met en Meer Zorg, in the colony of Demerara, to *John Newton*.

*John Newton.*

*H. F. Sloane.”*

Upon the sale of an estate, it is agreed that the purchase money shall be paid by instalments, with interest at 6*l.* per cent. The payments reserved under the name of interest are in substance part of the purchase money. Unless the sale be merely colorable, the transaction is not usurious.

The defendant pleaded the general issue. On the trial it was admitted, that the signature *H. F. Sloane*, to the said promissory note, was the signature of the defendant, who had changed his name to *Bidgood*; that the signature “*John Newton*” to the same promissory note, was

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the signature of the said *John Newton*, and that he died before the commencement of the present action; and that the said promissory note was duly presented for payment on the day it became due, at the house of Messrs. *Sandbach, Tinne, and Co.*, of Liverpool, mentioned in the said note, and that payment was refused. The agreement referred to in the said promissory note, and the account made out, settled, and signed between the parties at the time, and of which the following are copies, were also put in. Articles of agreement and conditions of sale and purchase made and entered into between *Joseph Beete*, of the colony of Demerara and Essequibo, but now residing in London, Esq., of the one part, and *John Newton*, of the said colony of Demerara and Essequibo, but at present residing, &c., Esq., of the other part:—Whereas the said *Joseph Beete* and *John Newton* are the joint proprietors and owners of a plantation called Met en Meer Zorg, situate on the west sea coast of the said colony of Demerara, between the plantations The William, on the east, and Kenderen and Boodes Rust, on the west, containing, &c.; and also the lands situate in Massaronia, purchased, &c., with the appurtenances, and all buildings, slaves, furniture, cattle, and appurtenances thereto belonging, in equal undivided moieties, or half parts; and whereas the said *Joseph Beete* hath contracted and agreed with the said *John Newton* for the absolute sale to him the said *John Newton*, free from all incumbrances, (except as hereinafter is mentioned), of the undivided moiety or half part of him the said *Joseph Beete*, of and in the said plantation, called Met en Meer Zorg, and the said lands in Massaronia, and all the buildings, &c., at or for the price or sum of 16,000*l. sterling money of Great Britain, being the balance of an account already drawn and stated by the said Joseph Beete and John Newton, and intended to be signed, upon the said Joseph Beete's signing a special power of attorney hereinafter mentioned; which said sum of 16,000*l.*, together with interest upon the several promissory notes added thereto for the time*

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they have to run, and which are written and stated at the foot of these presents, and to be dated respectively the 10th day of this instant month of March, and delivered to the said *Joseph Beete*, upon his signing and delivering the said special power of attorney, are to be in full of the said purchase money; and the said *John Newton* has agreed to purchase of the said *Joseph Beete*, his the said *Joseph Beete*'s undivided moiety, or half part, of and in the said plantation, lands, &c., the property of the said *Joseph Beete*, at and for the said price of 16,000*l.*, to be paid at the times, including the said interest to be added thereto, by the instalments and in manner specified in the said several promissory notes, stated at the foot of these presents, as agreed upon between the said *Joseph Beete* and *John Newton*. Now this present agreement witnesseth, and the said *Joseph Beete*, in consideration of the said sum of 16,000*l.* so paid to him the said *John Newton*, by the several promissory notes hereinbefore referred to, and intended to be written at the foot of this agreement, and to bear date respectively the 10th day of this present month of March, doth hereby agree to sell unto the said *John Newton*, his heirs, executors, administrators, and assigns, all that the undivided moiety or half part of him the said *Joseph Beete*, of and in the said plantation called Met en Meer Zorg, situate as hereinbefore is mentioned, and also of and in all those in Masseronia, purchased, &c., with all the cultivation, buildings, slaves, cattle, furniture, and other appurtenances, plantation and husbandry implements and utensils, stock in hand of all kinds, and every thing, of whatever denomination, thereunto respectively belonging or appertaining, and now being in, upon, or about the said plantation, lands, and premises aforesaid, or any of them or any part thereof, without any exception or reservation whatsoever, and all the estate, right, &c., of him the said *Joseph Beete*, into, out of, upon, or from the said plantation, lands, &c. To hold the said plantation, lands, &c., unto

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the said *John Newton*, his heirs, executors, administrators, order, and assigns, for ever freed and discharged of and from all incumbrances, claims, and demands whatsoever of him the said *Joseph Beete*, upon the said plantation, lands, &c., hereby agreed to be sold or any part thereof, but subject to a mortgage on the entirety of the said plantation called *Met en Meer Zorg*, and the buildings, slaves, and appurtenances thereunto belonging, to Messrs. *Molkenboer* and *Portielje*, of Amsterdam, for 20,000*l.* or thereabouts, and interest as first mortgagees, and also a second mortgage in favour of *C. F. Binqebane*, also of Amsterdam, for the sum of 5,000*l.* or thereabouts, and interest, and also a third mortgage to *D. L. C. Martini*, late of Demerara aforesaid, esquire, of the said plantation called *Met en Meer Zorg*, and the slaves thereto belonging, for the sum of 12,000*l.* and interest, and which said 12,000*l.* and interest is further secured to the said *D. L. C. Martini* as first mortgagee, on an additional number of 54 slaves, and as second mortgagee on 96 additional slaves; and the said *Joseph Beete* doth hereby agree and bind himself to execute, in favour of the said *John Newton*, on the 10th of this instant month of March, a legal power of attorney to *George Rainey*, *James Allan*, and *Charles Ridley*, of the colony of Demerara, to pass a legal transport of the plantation, lands, buildings, slaves, cattle, and all other the articles and things hereby agreed to be sold as aforesaid, unto the said *John Newton*, his heirs, executors, administrators, order, and assigns, according to the existing forms and laws of the said colony of Demerara: and it is hereby declared and agreed by and between the said *Joseph Beete* and *John Newton*, to be the true intent and meaning of them, and of these presents, that if any of the said promissory notes intended to be specified at the foot of this agreement, shall not be paid when and as they shall respectively become due, according to the respective tenors thereof, then that the said *Joseph Beete*, his heirs, executors, and administrators,

shall have, and be considered as having a lien and charge on the said moiety, or half part of the plantation, lands, &c., for the amount of any money due on any such note or notes as shall be and remain unpaid when due. But it is hereby further declared and agreed, that such lien and charge shall be not only subject to the several mortgages and incumbrances already affecting the entireties of the plantation, lands, &c., or any part or parts thereof, the moiety or half part whereof is so agreed to be sold as aforesaid, but also to a mortgage of the entirety of the said premises, to be made or intended to be made by the said J. N. and H. F. S. (who is about to become joint proprietor of the said plantation, lands, &c., with the said *John Newton*), to Messrs. *Sandbach, Tinne, and Co.*, merchants, at *Liverpool*, in Great Britain, for the sum of 2,800*l.* sterling money of Great Britain, *with interest thereon at and after the rate of 6*l.* per cent. per annum*, it being the intent and meaning of the said *Joseph Beete*, that the mortgage intended to be made of the entirety of the said plantation, lands, &c., to the said Messrs. *Sandbach, Tinne, and Co.*, as hereinbefore is mentioned, shall have priority to the lien or claim of him the said *Joseph Beete*, in and over the moiety of the said plantation, lands, &c.: and for the due and faithful performance of all, and singular, the stipulations and agreements hereinbefore contained, each of the parties hereto doth bind himself, his heirs, executors, administrators and assigns, and his, and their properties, unto the other of them, his heirs, executors, administrators and assigns, firmly by these presents. In testimony whereof, they the said *Joseph Beete* and *John Newton*, have hereto set their hands and seals, at *London*, this 8th day of *March*, in the year of our Lord 1821.

JOSEPH BEETE, L. S.

JOHN NEWTON, L. S.

Signed, sealed, and delivered, in the presence of, &amp;c.

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I, the undersigned, *Joseph Beete*, do hereby acknowledge to have received of, and from the said *John Newton*, the seven several promissory notes hereinafter mentioned, respectively signed by the said *John Newton* and *Henry Fisher Sloane*, being the amount of the said sum of 16,000*l.*, *the money agreed upon for the said purchase, and the balance of the said account, stated between them the said Joseph Beete and John Newton as aforesaid*, together with the interest on the said sum of 16,000*l.* added thereto for the time the respective bills have to run, *making in the whole, principal and interest, 20,800*l.**, that is to say.

JOSEPH BEETE.

Witness, J. WARD.  
 JOHN TALBOT.

London, 10th March, 1821.

On the 1st July, 1822. We promise to pay to *Joseph Beete*, Esq., his executors, or administrators, at the house of Messrs. *Sandbach, Tinne, and Co.*, of Liverpool, the sum of 960*l.*, for value received in the first year's instalment, as expressed and specified in agreement for the sale of his moiety in plantation, *Met en Meer Zorg*, in the colony of Demerara, to *John Newton*.

JOHN NEWTON.  
 H. F. SLOANE.

Same date.

On the 1st July, 1823. We promise to pay, &c. (The case then proceeds to set out notes in the same form for the subsequent yearly instalments, viz:—960*l.* in 1823, 4160*l.* in 1824, 3968*l.* in 1825, 3776*l.* in 1826, 3584*l.* in 1827, and 3392*l.* in 1828).

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London, 8th March, 1821.  
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**If the Court shall be of opinion that the said promissory note is void for usury, a verdict is to be entered for the defendant; but if not, then the verdict for the plaintiff is to stand.**



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The points for argument, stated in the margin of the paper books, were these:—"The plaintiff contends, 1st, that this transaction is not usurious, because there is neither a loan nor a forbearance within the meaning of the statute 12 *Anne*, stat. 2, c. 16." And, secondly, "that if there was any such loan or forbearance, as the interest intended to be taken was the legal interest in the colony of Demerara, viz. six per cent. per annum, the agreement on which these notes were given was good; 14 *Geo.* 3, c. 79; 1 and 2 *Geo.* 4, c. 51; 3 *Geo.* 4, c. 47. On the notes themselves, no interest is reserved."

*Armstrong*, for the plaintiff. There was no usury whatever in this transaction. This case is distinguishable from *Dewar v. Span* (a). There the bond, on the face of it reserving six per cent., it was necessary to bring the case within the statute (b). That also was a subsequent bond. [*Bayley*, J. Does not the 14 *Geo.* 3, apply only to cases where the security is on the estate?] Here the promissory notes carry no interest on the face of them. But the plaintiff relies on the construction of the agreement. The only difficulty is from the use of the

(a) 3 T. R. 425; and see S. C., 5 *Wentw.* 395; *Stapleton v. Conway*, 3 *Atk.*, 727; 1 *Ves. sen.* 427; *Bodily v. Bellamy*, 2 *Burr.* 1094, 1 *W. Bla.* 267.

(b) 14 *Geo.* 3, c. 79. Which enacts "that all mortgages and securities already made in Great Britain, of and concerning any lands, &c. in the kingdom of Ireland, or in any of the said colonies, plantations, or dominions, or any estate or interest therein, for securing the re-payment of the sums of money thereon respectively, really, and *bonâ fide* advanced and lent, with interest for the same, and all bonds, &c., and all trans-

fers, &c., shall be as good, valid, and effectual as such mortgages, &c., would have been, if made and executed in the kingdom, island, plantation, country, or place where the lands, &c., lie, or are; and that none of his majesty's subjects in Great Britain shall be subject or liable to any of the penalties or forfeitures in 12 *Anne*, stat. 2, cap. 16, by receiving or taking interest on the sum or sums really and *bonâ fide* advanced and lent on any such mortgage, &c., at the rate of interest allowed and established by the law of the kingdom, &c., wherein the mortgaged premises respectively lie or are."

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word interest. In *Harvey v. Archbold* (a), where it appeared that A., the London correspondents of B., a merchant carrying on business at Gibraltar, had agreed on the consignments of goods to B., to accept, on B's. account, bills at 90 days, drawn by C., the consignor, for two thirds of the invoice price, B. charging the amount of the bills in Gibraltar currency with the exchange and six per cent interest from the date of the bills, C. to be allowed interest on balances in the hands of B., at six per cent, that being the legal interest at Gibraltar, and the usual mode of remitting from Gibraltar, being by bills at 90 days, it was held by the Lord Chief Justice, that the agreement was not usurious. The Attorney General moved for a new trial, mainly on the construction of the agreement, but the Court refused to grant a rule *nisi*. In this case the whole difficulty arises from the use of the word interest. In *Barclay v. Walmsley* (b), it was held, that the acceptor of a bill taking a premium from the holder, for payment of the bill before it was due, was not

(a) 1 Ry. & Mood. 184. And by this Court, 5 D. & R. 500; 3 B. & C. 626.

(b) 5 East, 55. By the civil law, this *lucrum ex prerogata solutione exactum*, would be clearly usurious; See *Pothier, Traité, de l'Usure*, Numm. 91, et 128. The civilians and canonists regarding money as possessed of an unvarying intrinsic value, consider that every lender, in getting back the sum which he has advanced, receives a full equivalent for his advance, and that whatever he obtains beyond that sum is extorted from the weakness or from the necessities of the borrower. If this principle were correct, it would obviously apply to a payment by anticipation; in the case either of a loan or of discount, a smaller present payment is substituted for a larger deferred payment. In

support of this principle it is urged, that though upon the loan of a specific chattel (*commodatum, prêt à usage*), the lender may justly stipulate for a reward for the benefit which the borrower derives from the use of such chattel, yet on the loan of money, or other things which are not to be restored in specie (*mutuo datum, prêt de consommation*), but are to be spent or consumed, in order to make the loan available, the borrower retains no possession or use of the thing lent, and cannot, therefore, be justly required to pay to the lender any reward for the use of the money or goods, though the latter may fairly demand a compensation for any loss or injury which he may have sustained in order to enable him to make or to continue the advance, in which case the lender merely receives *quid*

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guilty of usury, there being no loan or forbearance. The 16,000*l.* is called the price of the estate, and is never considered as a present debt. It was never meant to be

*sud* INTEREST, *ses* *dommages intéréts*, whereas every thing, whether in money or money's worth, which the lender receives merely for the use of the money, is according to the original signification of the term usury. The distinction between the two contracts, from which the lawfulness of receiving *hire* in the one case, and the unlawfulness of taking *usury* in the other, is inferred, is perhaps more apparent than real. Where money is borrowed for the purpose of being employed in agriculture, manufactures, or commerce, the coin or notes advanced are merely the medium by which a certain portion of the lender's *capital* is transferred to the borrower, and though this is seen only momentarily in the form of money, it continues to exist in different shapes, under the control of the borrower, and operating for his advantage until the termination of the loan, at which period it is restored to the lender in the pecuniary form in which it was originally received. It seems difficult to say, that in this case the borrower has not the use of the loan during the continuance of the contract, as beneficially as the borrower of a waggon, or of a ship. In the law of England, the distinction between interest and usury is merely the arbitrary creation of positive law, depending simply upon the rate or amount of increase reserved; and it is immaterial whether the calculation proceed upon the principle of indemnity or of profit. Thus, the reserving of

six per cent by a lender, who has submitted to a corresponding sacrifice to enable him to make the advance, is in the legal acceptance of the term, *usury*, though he receives strictly *quid sud* INTEREST; whilst 5 per cent. reserved by a party upon a loan, whose money would otherwise have produced less, or have lain idle, is legal *interest*; legal usury, depending upon the statute (12 *Anne*, c. 16), which speaks only of loan and forbearance, and not of every species of remuneration for the use of money. The Court, in *Barclay v. Walsley*, necessarily held, that a payment by anticipation of a debt, not yet due, was not within the statute; as a man cannot be said to *lend* the money which he pays merely in discharge of his own engagements, or to *forbear* that which he can never demand; see also the same case, 5 *Esp.* 11, and see *Masterman v. Cowrie*, 3 *Campb.* 488; *Kent v. Lewis*, 1 *Campb.* 177; *Hutchinson v. Piper*, 4 *Taunt.* 810; *Aynsworth, ex parte* 4 *Ves. jun.* 678; so if the discounter, or party who advances the money, is not the debtor, the sum deducted from the principal, however large, does not make the transaction usurious, unless the discounter holds the party to whom he makes the advance, liable, by indorsement or otherwise, for the due payment of the debt; in which case the transaction is considered as a loan, and not as the purchase of a debt, *Rex v. Ellis*, 4 *Price*, 50.

paid for at the time, but by instalments. The vendor might have secured a much greater sum. Unless the Court is of opinion that this was a pretended sale, this cannot be usury. In *Floyer v. Edwards* (a), it was held, that where one sold goods at three months' credit, but stipulated that in case the money was unpaid he should be allowed a halfpenny per ounce, the contract being found to be a *bonâ fide* sale, was not usurious. In *Doe dem. Metcalf v. Brown* (b), where A. conveyed premises to B., and at the same time agreed to repurchase them within fifteen months, at a considerable advance, it was held, that the contract was not usurious, unless meant as a cover for a loan, which was a question of fact for the jury. Here there could be no forbearance, because there was no right to sue. Nothing was due until the time when the promissory notes became payable.

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*Patteson, contra.*—The statute (c) being abandoned, the question is now simply whether, upon the sale of property in this country, this would have been usury. To ascertain what the parties meant, the Court will look at the construction which they themselves have put upon the agreement. The six per cent. is expressly called interest, not purchase money. It is not stated that the sale was in consideration of 20,000*l.*, as it would be upon the construction now sought to be established. The parties contemplated an immediate conveyance. They state 16,000*l.* to be the consideration money. [*Bayley, J.* It would be matter of calculation at the Stamp Office.] It is necessary to satisfy the Court that there was a forbearance of money. If the sale was for 20,000*l.*, it must be admitted that there is no usury; here the parties chose to treat it as a matter of account. [*Bayley, J.* Could either party have insisted upon paying or receiving the money before the days on which it was payable by the notes?] There was a case in the Common Pleas, in which a party wanted to pay before hand, having borrowed other money at four per cent., and being bound to pay five. No

(a) Cowp. 112. (b) Holt, N. P. C. 295. (c) 14 Geo. 3, c. 79.

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authority could be found on either side, and the parties compromised. If the argument now submitted on the part of the defendant is right, the party might be compelled to receive the money. The test in this case is the conduct of the parties themselves. *Floyer v. Edwards* (a) is very different. In that case there was no forbearance, but a penalty. It was not incumbent on the part of the plaintiff to forbear. How far that case may have been maintainable by the custom of the trade is another question (b). The seller might have called in his money. Here the lender was bound not to call it in. It is not necessary that there should be an actual transfer of money to constitute usury. The debt accrued on the settlement of the account. The plaintiff might have sued, unless he had agreed to give time. There was a debt before the account, as between the plaintiff and *Newton*. [*Bayley, J.* The account looks to a purchase. *Holroyd, J. Newton* was debited 25,000*l.* *Bayley, J.* What is there to shew the account anterior to the contract? Lord *Tenterden, C. J.* All is dated the same day]. It is admitted that all was part of the same transaction. [*Holroyd, J.* That transaction was a sale of an estate]. No notice is taken of the sum of 25,000*l.* in the agreement. [*Bayley, J.* Of the 9,000*l.*, they deduct 5,000*l.* as a loss. The plaintiff makes an allowance of 5000*l.* as his share of the loss]. They treated the 16,000*l.* as the balance of an account. It was an actual sale for that sum. [*Holroyd, J.* There was no debt of 16,000*l.*, except that which arose by an actual sale]. They treat the 16,000*l.* as principal, and charge six per cent. as interest. They should have called it 20,000*l.* by instalments. The defendant considers, that when he was signing the note, he was a party to a contract of forbearance; being the balance of an account, they contemplated the forbearance of a debt, for which the plaintiff might have sued.

Lord TENTERDEN, C. J.—This case comes before the

(a) *Cowp.* 112, *ante*, 153.

(b) And see *Aynsworth, ex parte*, 4 *Ves. jun.* 678.

Court out of a contract for the sale of an estate, not out of a contract of loan; though the parties have calculated the price partly in what they considered the value in present money, partly in money to be paid at a future day, They have chosen to call it "interest," which creates the whole difficulty. If they had said "payable by instalments," there would have been no doubt. Our business is to look not at the words, but at the substance. If we are to look at the substance of a transaction to ascertain whether, notwithstanding the words used, the case is within the statute (*a*), so, on the other hand, we must look to see whether, though the words used appear to be within the statute, the substance is not so. Here I am clearly of opinion, that in substance there is no usury.

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BAYLEY, J.—To constitute usury, there must be a loan or forbearance. Here there was no loan or forbearance. This was a contract of purchase.

HOLROYD, J.—There was no loan of 16,000*l.*, nor any debt of 16,000*l.*; there was no debt but what arose upon giving the notes.

LITLEDALE, J.—This is a contract for the sale of an estate, and not a loan of money. The plaintiff in effect said, if you can pay me 16000*l.* down, you shall have the estate at that price. The purchaser says, no, but I will pay you by instalments; upon which, the seller says, then you shall pay me at the rate of six per cent. That they considered to be a reasonable rate. The jury have not found that this was a colour, nor does it appear to be so upon the case (*b*). The doubt is raised merely by the use of the term "interest."

Postea to the plaintiff (*c*).

(*a*) See *Marsh v. Martindale*, 8 Bos. & Pul. 154.

(*b*) Vide *ante*, 135 (*c*), 136 (*c*).

(*c*) And see *Bernard v. Young*, 17 Ves. jun., 44; *Dearden v. Binns*, *ante*, 130; *Solarte v. Melville*, *post*.

For the law of usury in general, see Comyn on Usury; *Pothier, Traité de l'Usure*; Say, *Traité de l'Economie Politique*, 2d vol., 2d edition, 111; 3d edition, 122. In connection with this colonial

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*Armstrong* applied to correct the sum, for which the nominal verdict had been taken.

case, the following enumeration of the principal decisions in the American courts on the subject of usury may not be uninteresting. First, as to what constitutes usury, *Musgrove v. Gibbs*, 1 Dallas, 216; *Rose v. Dickenson*, 7 Johns. Rep. 196; *Bennett v. Smith*, 15 Johns. Rep. 355; *Dunham v. Gould*, 16 Johns. Rep. 367; *Eagleson v. Shotwell*, 1 Johns. Cha. Rep. 536; Anonymous, 2 Desaus. Cha. Rep. 333; *Hamlin v. Fitch*, Kirby's Rep. 261; *Wadsworth et al' v. Champion*, 1 Root's Rep. 393; *Kent v. Phelps*, 2 Day's Rep. 483, S. C. 4 Day's Rep. 96; *Hutchinson v. Hosmer*, 2 Conn. Rep. 341; *Cutler v. How*, 8 Mass. Rep. 257; *Cutler v. Johnson*, 8 Mass. Rep. 266; *Northampton Bank v. Allen*, 10 Mass. Rep. 284; *Brown v. Brent*, 1 Hen. & Munf. 550; *Pollock v. Baylor's Devises*, 4 Hen. & Munf. 490; *Skipwith v. Gibson and Jefferson*, 4 Hen. & Munf. 490; *Watkins v. Taylor*, 2 Munf. 424; *Bull v. Douglass*, 4 Munf. 303; *West v. Belcher*, 5 Munf. 187; *Winslow v. Dawson*, 1 Wash. Rep.; *Groves v. Graves*, 1 Wash. Rep. 1; *Glisson v. Newton*, 1 Hayw. Rep. 336; *Carter v. Brand*, Cam. & Norw. Rep. 28; *Tardeveau v. Inns and Smith*, Hardin's Rep. 175; *Hammond v. Alexander*, 1 Bibb's Rep. 333; *Richardson v. Brown*, 3 Bibb's Rep. 207. Secondly, As to the effect of usury upon the contract. Where more than legal interest is included in any note, bond, or specialty, the whole cannot be recovered, but the plaintiff is entitled to the just principal and interest. *Wycaff v.*

*Longhead*, 2 Dallas, 92. So the Court will order a defendant to account for moneys overpaid in pursuance of an usurious contract, *Day v. Dunham*, 2 Johns. Chanc. Rep. 191; and a creditor will not be permitted to make it the condition of a loan that he shall receive a compensation for his services, *Hine v. Handy*, 1 Johns. Cha. Rep. 6. So where a party, instead of lending money, gave a note, and received a note in exchange, amounting to more than the legal interest for the time the note had to run; the note was held to be void. *Dunham v. Gould*, 16 Johns. Rep. 367; *S. P. Thompson v. Thompson*, 8 Mass. Rep. 135. But unless usurious interest be originally reserved by the contract, a security for the loan of money upon which usurious interest has been received, is not void. *Gardner v. Flagg*, 8 Mass. Rep. 101; *Thompson v. Woodbridge*, 8 Mass. Rep. 256. *Chadbourn v. Watts*, 10 Mass. Rep. 121. (*Et vide ante*, 129). Nor will including the principal in one security, and the interest in another, prevent both from being avoided as forming part of the same transaction. *Jones v. Witney*, 11 Mass. Rep. 74. *Maine Bank v. Butts*, 9 Mass. Rep. 49. But if a security void for usury, be given for a simple contract debt, it is no discharge of the debt, which remains good. *Johnson v. Johnson*, 11 Mass. Rep. 359. A judgment rendered by default, on a contract including usurious interest, cannot for that cause be avoided. *Thatcher v. Gammon*, 12 Mass. Rep. 268. See

Lord TENTERDEN, C. J.—We can add nothing to the verdict.

also *Edmondson v. King et al*, Overton's Rep. 425. But it would seem that a defendant may, to a *scire facias* brought to revive a decree obtained against him by default, plead that the original contract was usurious. *Lane v. Elsey*, 4 Hen. & Munf. 504. It has been said also, that a judgment upon an usurious contract, when made the consideration for another contract is neither an illegal, nor a void consideration, *Bearce v. Barstow*, 9 Mass. Rep. 48. A *bonâ fide* purchaser under a sale, duly made by virtue of a power contained in a mortgage, will not be affected by usury in the debt for which such mortgage was given; *Bartlett et al v. Henry*, 10 Johns. Rep. 185. See Mass. Rep. 268. Thirdly, as to the relief in equity. A court of Equity will not relieve against a judgment at law on the ground of usury, where the defendant neglected to avail himself of the defence, that it would have been to the action at law, and where pending such action, he neglected also to apply in due season for a bill for discovery;

*Lansing v. Eddy*, 1 Johns. Chan. Rep. 49; *Thompson v. Berry et al*, 3 Johns. Chan. Rep. 395. And in giving relief, it requires the complainant to pay all that may be justly due on the transactions to the defendants, after stripping them of usury; *Anonymous*, 2 Desaus. Chan. Rep. 334. And he must tender or bring into Court the money actually lent, and lawful interest thereon, before an injunction will be granted to stay proceedings at law on the usurious contract; *Rogers v. Rathburn*, 1 Johns. Chan. Rep. 367. A discovery will be compelled only upon the same terms; *Tupper v. Powell*, 1 Johns. Chan. Rep. 439. So where the bill does not pray a discovery, but is filed to stay proceedings on an usurious deed of trust, the Court ought not to grant the party relief against the usury, on condition of his paying the principal sum, without interest, but should altogether enjoin the trustee from selling until the validity of the contract be determined; *Marks v. Morris*, 2 Munf. 407.

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**ACTION** on a policy of insurance, bearing date 22d February, 1826, effected by the plaintiff, as agent for one *A.* lets his ship to freight and charter to *B.* for a voyage, the probable duration of which is eight months, at 100*l.* per month, and by the charter-party *B.* is to make the advances for sailing charges, on account of the money payable for the hire of the ship, miscalled "freight;" *B.* insures 300*l.* with *C.*, for money advanced on sailing charges, and *A.*, at the same time, insures with *C.* 400*l.* on freight. Upon a total loss, *C.* is not entitled to consider *A.*'s policy as effected on gross freight, and that the amount being 800*l.*, *A.* is his own insurer for a moiety of the risk.



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*Sharp*, for 400*l.* on the *Mary*, upon freight on a voyage from Gibraltar to Omoa, during her stay there, and thence to her port of discharge in Europe, not in the Baltic or Mediterranean, with leave to call at Gibraltar for any purpose. This policy was subscribed by three of the directors of the Patriotic Assurance Company of Ireland, of which company the defendant was a member (*a*), at 70*s.* per cent., to return 9*s.* 6*d.* per cent. if she discharged at Gibraltar, or in the United Kingdom. The first count of the declaration stated, that before and at the time of the loss, *Sharp* had let to freight and chartered the said ship to one *Aikin*, for a certain term agreed upon between

(*a*) By 5 *Geo.* 4, c. 154, intituled, "An act to enable the Patriotic Assurance Company of Ireland to sue and be sued in the name of the secretary or of one of the members of the said company," it is provided, s. 1, "That all actions and suits to be commenced, instituted, or carried on by or on behalf of the said company or partnership, or of the members, partners, or proprietors interested therein for the time being, against any person or persons (whether such person or persons is or are or shall then be a member or members, partner or partners, proprietor or proprietors of or in the said company or partnership or not), or against any body or bodies politic or corporate, shall and lawfully may be commenced, instituted, and prosecuted or carried on, in the name of the secretary for the time being of the said company or partnership, or in the name of the person acting or officiating as such, or in the name of any one member for the time being of the said company or partnership; and all actions and suits to be commenced or instituted against the said com-

pany, shall be commenced, instituted, and prosecuted against the secretary for the time being of the said company or partnership, or the person acting or officiating as secretary, or against any one member of the said company or partnership, as the nominal defendant for and on the behalf of the said company." And by s. 8, it is provided, "That it shall not be lawful for the said company, or any person or persons on behalf of the said company, in any manner to stipulate, contract, or agree with any person or persons to limit or restrict the liability of the members of the said company, or any of them, or to make any special agreement in relation to the extent of the liability of the members of the said company, or any of them, other than or differing from such contracts or agreements as are usually made between general partners in trade, and others contracting with them, except so far as such contracts and the remedies for enforcing the performance of the same, are effected by the provisions of this present act, and the true intent and meaning of the same."

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them, and that the said ship was and remained so let to freight and chartered, from the time of making the policy until and at the time of the loss, at and for certain freight, therefore payable by *Aikin* to *Sharp*; and that *Sharp* was, at the time of the making of the policy, and from thence until and at, &c., interested in the freight so payable by *Aikin* to *Sharp*, as aforesaid, being the freight so insured as aforesaid, to a large value and amount, to wit, to the value and amount of the sum so insured as aforesaid, and of all the moneys by *Sharp* ever insured, or caused to be insured thereon: that on the 8th of October, 1825, the said ship being so let to freight, and chartered as aforesaid, departed and set sail from Gibraltar aforesaid, on her said voyage to *Omoa* aforesaid, and afterwards, to wit, on the 25th day of December, 1825, arrived at *Omoa* aforesaid; and that afterwards, to wit, on the 4th day of April, 1826, the said ship so let to freight, and chartered as aforesaid, set sail from *Omoa* aforesaid, towards Gibraltar aforesaid, and her port of discharge in Europe, and that the freight on the said ship, so being let, &c., in case of her arrival there, would have amounted to a large sum of money, to wit, 600*l*. Then followed the statement of a total loss by the perils of the seas. The second count stated, that the policy was made by the plaintiff as the agent of *Sharp*, and for his use and benefit, and that plaintiff did receive the order for, and effect the policy as such agent as aforesaid; and that *Sharp* was at the time of the making of the policy, and from thence, until, &c., interested in the freight of the ship for the said voyage, to the value and amount, &c. A total loss was then stated, as in the first count. The third count differed from the second, in stating only a particular loss of 90*l*. per cent. There were also counts for money lent, money paid, money had and received, and on an account stated. To this declaration the defendant pleaded *non assumpsit*, and paid 200*l*. into Court. He afterwards paid into Court, a further sum of 67*l*. (a).

(a) The defendant considering the plaintiff's interest insured to be

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At the trial before *Bayley, J.*, at the last assizes for the county of Lancaster (a), it appeared, that on the same day on which the policy declared upon had been effected, another policy had been effected with the company by *Aikin*, for 350*l.*, on money advanced for sailing charges, at and from Gibraltar to Omoa, during her stay there, and thence to her port of discharge in Europe, not in the Baltic or Mediterranean, with leave to call at Gibraltar for any purpose, and to discharge and take on board wherever she might call at or proceed to. Premium 70*s.*, to return 9*s.* 6*d.* on discharge at Gibraltar, or in the United Kingdom. By charter party, 10th August, 1825, *Sharp* let to freight and charter, unto *Aikin*, the schooner *Mary*, for and during the term of six calendar months, to commence and be computed from the day she should sail from the port of Liverpool, and to be employed by *Aikin* upon such lawful voyages from and back to the port of Liverpool aforesaid, and in such lawful trade as he might direct during the said term. In consideration whereof, *Aikin* covenanted to pay *Sharp* in full for the freight and hire of the said vessel for the said term, at and after the sale of 100*l.* sterling per month, for each and every month during the said term, to be paid, and payable free of interest, commission, or other charge whatsoever, in manner following (that is to say): the sum of 50*l.* immediately upon the sailing of the said vessel from the port of Liverpool aforesaid, as much cash as might be from time to time required and sufficient to pay *all wages and sailing charges* of the said

eight months' pay, or 800*l.*, and that he was short insured for one half, and the defendant liable only for half the loss, appears to have deducted 270*l.*, the money received for wages and sailing charges, from 800*l.*, the total amount of the gross freight, which would leave 530*l.* as the total amount of the loss; and he paid into Court half of 530*l.*, or 265*l.*, leaving in dispute 135*l.*, i. e. 400*l.*,

less 265*l.*; but afterwards finding that the period between the 8th of October, and the time of the loss, was two days short of six months, and being apprehensive that a part of the 270*l.* was recoverable back, he increased his payments to 267*l.*

(a) Counsel for the plaintiff, *F. Pollock* and *Tomlinson*; for the defendant, *Brougham*, *Parke*, and *Crompton*.

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vessel; and the residue of such freight, as might be due after the rate aforesaid, at the completion of each voyage the vessel might make; and in case the said vessel should be absent, or detained from her final port of Liverpool, beyond the said term, then, and in that case, the said *Aikin*, his executors and administrators, should continue to pay freight, after the rate and in manner aforesaid, until she should return to the said port, and be finally discharged and given up; and if the said vessel should be finally given up by *Aikin* to *Sharp* before the expiration of the said term, he, the said *Aikin*, would nevertheless, pay to the said *Sharp* the sum of 600*l.*, in like manner as if the said vessel had been employed by *Aikin* for the full term of six months; and, moreover, that he the said *Aikin*, his factors, or agents, would pay all port charges, quarantine charges, consulage, pilotage, and droyerage, incurred or payable during the continuance of the voyage. By an agreement, dated 10th August, 1825, and made between *Sharp*, therein described as owner of the *Mary*, of the one part, and *John Lilly*, master and mariner, of the other part; after reciting that *Sharp* had chartered the vessel to *Aikin*, for the term of six calendar months, or thereabouts, and that *Sharp* had, on the suggestion and recommendation of *Aikin*, appointed *Lilly* master of the vessel, at the pay of eight pounds per month; and that it had been agreed between the parties thereto, that *Lilly* should find a sufficient crew for the vessel, and pay himself and all wages, victualling, sailing, and other incidental expenses (except the wear and tear of the vessel), during the subsistence of the charter; and in consideration thereof, that *Sharp* should pay or allow to *Lilly* at the rate of 45*l.* per month, it was witnessed, that, for the considerations thereafter mentioned, *Lilly* agreed that he would, at his own expense, during the subsistence of the charter, find and provide a sufficient crew, competent to navigate the vessel, and all provisions and stores that might be requisite and necessary; and pay all wages

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(including his own), and all sailing and other charges and expenses incident to the vessel during the charter (except such as were occasioned by damage to, or wear or tear of, the vessel); and should indemnify *Sharp*, and also the vessel, from and against all claims and demands for, or on account, or in respect of, the crew, provisions, stores, sailing, and other expenses aforesaid, during the subsistence of the charter. In consideration whereof *Sharp* agreed to pay *Lilly* at the rate of 45*l.* per month, and so in proportion for a less time than a month, for each month during the subsistence of the charter (*a*).

The *Mary* sailed from Liverpool on the 16th of August, 1825, arrived at Gibraltar on the 16th of September, and discharged her cargo there on the 8th of October. On the 20th of October she sailed from Gibraltar, with a competent master and a sufficient crew, and in every respect staunch and provided for her intended voyage for Omoa, where she arrived on the 25th of December, and immediately discharged her cargo. She then immediately commenced taking on board another cargo for Gibraltar; and having completed her loading, and being manned, staunch, and provided as aforesaid, sailed for Gibraltar on the 4th of April, 1826; and on the 6th of April, 1826, whilst proceeding on her said last-mentioned voyage, she was totally lost by the perils of the seas. The time which the voyage from Gibraltar to Omoa, and back to Gibraltar, including the loading and discharge there and at Omoa, would have

(*a*) As to the question, whether advances made by the freighter form part of the freight, and constitute an insurable interest, see *De Silvale v. Kendall*, 4 M. & S. 37; *Manfield v. Maitland*, 4 B. & A. 582: and as to the conflicting rights and liabilities of insurers upon ship, and insurers upon freight, see *Case v. Davidson*, 5 M. & S. 79, where it was held by the Court of King's Bench, that when ship and freight

were abandoned to the respective underwriters, the freight earned upon recapture belonged to the underwriters upon ship; which judgment was affirmed in error, 2 Bro. & B. 379. And see a general investigation into the principles of indemnity with regard to insurance on ship and freight, in *Benecke*, On the principle of indemnity in Marine Insurance, chap. 2.

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occupied, if the vessel had not been lost, is fairly computed at eight months, from the 8th of October, 1825, to the 8th of June, 1826. *Sharp* was interested to the extent of the whole amount of the freight, which accrued due, or which could have accrued due under the charterparty. After the insurance declared upon was effected, the master of the said vessel received from *Aikin*, or his agents at Omoa, for wages and sailing charges, which became due to the said *Sharp* from the said *Aikin*, in respect of the said voyage from Gibraltar to Omoa, and back to Gibraltar (including loadings and discharges aforesaid), the sum of 270*l.*, being at the rate of 45*l.* per month, from the 8th of October to the time of the loss, and being the rate stipulated in the agreement between *Sharp* and the master (*Lilly*). On *Aikin*'s policy the company had paid 210*l.* *Aikin* being called as a witness for the plaintiff, stated, that he went with the plaintiff to *Reynolds*, the agent of the company, and effected the insurance for 350*l.*, at the same time that the plaintiff effected the policy declared on, and that the witness's policy was on money advanced for sailing charges; that witness and plaintiff stated to *Reynolds*, the company's agent, with whom both insurances were effected, the particulars of the original charter, and that witness had to pay 100*l.* a month; that they entered into a calculation, by which it appeared that the voyage would extend to eight or nine months, and that, after the sailing charges, witness would have to pay a balance of 400*l.* or 450*l.* to *Sharp* on safe arrival, and that *Reynolds* perfectly understood the calculation. On the part of the defendant it was proved, that on a general policy on freight, it was usual to pay losses without reference to deductions for sailing charges (*a*).

(*a*) In *Stevens on Average*, 3d edit, 173, it is said, "on an open policy on freight, the interest is, according to the practice at Lloyd's, the amount of the manifest, or freight-list, covered with the premium, &c. It is said by some, that the interest in freight ought to be that sum, and no more, which the owner calculates on receiving,

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For the defendant it was contended, that evidence of the policy effected by *Aikin* ought not to be received ; that the testimony of *Aikin* ought not to be admitted to control the written document declared upon ; and lastly, that upon the legal evidence in the cause, the loss was covered by the money paid into Court, inasmuch as the policy effected by the plaintiff must be understood to be upon gross freight, and that, consequently, he was his own insurer for the difference between the 400*l.* insured, and 800*l.*, the amount of such gross freight. The learned Judge overruled these objections, and directed a verdict in favour of the plaintiff for the full amount of the sum insured, being of opinion, that as the policy was a contract of indemnity, in the case of an insurance upon freight, the amount insured, and at risk, was that net sum, which the plaintiff, at the termination of the voyage, would have put into his pocket, after deducting all sailing expenses (*a*). Leave was, however, given to the defendant to move to enter a nonsuit, or for a new trial.

Brougham now moved accordingly. 400*l.* was insured ; the amount of the risk was 800*l.*, leaving the plaintiff his own insurer as to a moiety, and money was paid into Court upon that principle (*b*). The gross freight was 800*l.*, and the plaintiff says, that seamen's wages, &c., are to be deducted from his half, and that the defendant, therefore, ought to pay the whole sum insured. *Aikin* was called by the plaintiff, and permitted to prove calculations entered into at the time when the policy was effected, in order to shew what was intended by the parties in using the word "freight." [Lord *Tenterden*, C. J. The sum which the witness paid, he improperly called freight. The "freight" for which this insurance was made by the plaintiff, was

in case the ship is lost ; that is all he loses. But the practice is as before stated ; and it is probable it will remain so, unless the law shall

decide otherwise."

(*a*) See Valin, 2d vol., 200, 201, edit. 1761 ; *post*, 165 note (*a*).

(*b*) *Ante*, 159 (*a*).

money which he was to receive from *Aikin* for the hire of the ship. *Bayley, J.* A common policy on freight would cover sailing charges (*a*). Here another policy was effected at the same time]. The terms of the contract ought not to be imported from another instrument. It was shewn to be the universal usage to settle upon the gross freight.

Lord TENTERDEN, C. J.—Here there was another policy for the express purpose of meeting the outgoings.

BAYLEY, J.—It was a plain explanation at the time of the species of interest to which the insurance was to apply.

Rule refused (*b*).

(*a*) *Vide ante*, 163 (*a*).

(*b*) And see *Wilson v. Royal Exch. Ass. Comp.*, 2 Campb. 626; *Pothier, Traité du contrat d'Assurance*, chap. 1, sec. 2, no. 36 et 39; *Davidson v. Walmsley* 1 M. & S. 313; *Atty v. Lindo*, 1 N. R. 236; *Gibbon v. Mendes*, 4 B. & A. 17; *Stevens* (on Average, 61, 2), says, "some persons hold, I presume on the authority of the Digest, (Dig. ad Leg. Rhod. 1, 2, s. 3. Ord. Ph. 2, art. 7; Vinn. in Peck., &c.), that not only the wages but the provisions ought to be deducted from the freight, and a learned and excellent writer before quoted, appears to be of this opinion (Abbott, part 3, ch. 8, sect. 10); for in a *pro forma* statement given of a general average claim, he deducts the wages and victuals from the freight, and this, though the ship is supposed to have sailed from Portsmouth, and to have put into Ramsgate in distress. No satisfactory reason can be given, why the ship's provisions, which are part of the ship's stores, should be deducted from the freight; what is expended of them, as I have endeavoured

to shew, ought to be deducted from the original value of the ship, and not from the amount of the freight." The passage in the Digest here referred to, seems to be the following:—"Itidem agitur ut an etiam vestimentorum cujusque et annulorum estimatio fieri oporteat? Et omnium visum est, nisi si qua consumendi causâ imposita forent, quo in numero essent cibaria, eo magis quod si quando ea defecerint in navigatione, quod quisque haberet in commune conferret, Dig. Lib. 14, Tit. 2, Leg. 2, sec. 2." The same principle is confirmed and extended in the *Ordonnance de la Marine*, Liv. 3, Tit. 8, Art. 11, "*Les munitions de guerre et de bouche, ni les loyers et hardes des matelots ne contribueront point au jet, et néanmoins ce qui en sera jeté sera payé par contribution sur tous les autres effets.*" The non-liability of these matters to contribution in case of general average, does not appear to have any connection with the propriety of considering them as a deduction out of freight, whenever freight becomes the subject of general average, or (as is allowed by the

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law of England), of insurance. In commenting upon this article of the Ordonnance, however, Valin says, (2 vol. 200), "*Mais la raison pour laquelle les loyers des matelots ne contribuent pas au jet, est—qu'au fonds le propriétaire ou le maître du navire contribue à leur décharge pour leurs loyers en contribuant jusqu'à concurrence de la moitié du fret à raison duquel il est chargé de leur*

payer leur loyers." And again, (page 201), "*En fait de contribution au rachat du navire et de son chargement, il y a cette différence, que le navire et le fret y entrent pour le tout, déduction faite toutefois des vituailles consommées, et des avances faites aux matelots, et que les matelots contribuent aussi à la décharge du fret à proportion de ce qui leur restera dû de leurs loyers.*

HARPUR v. LUFFKIN.

A father may maintain an action of trespass for the seduction of his daughter and servant, whom he maintains in consideration of her services, though she be a married woman; for though the relation of master and servant subsisting between them, may not be binding as against her husband, it is binding as against a stranger and a wrong-doer.

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TRESPASS for assaulting and debauching plaintiff's daughter and servant, *per quod servitium amisit*. Plea, not guilty, and issue thereon. At the trial before Gaselee, J., at the last Lent assizes for Essex, the case was this. The plaintiff's daughter was a married woman, but separated from her husband, who resided in London. She had three children, issue of her marriage, and resided with them, near Colchester, in the house of the plaintiff, by whom they were all maintained. Here she acted in the capacity of a servant; but she received no wages: and the children were too young to perform any service. While the parties were thus situated, the plaintiff's daughter became acquainted with the defendant, and entered into an illicit connexion with him, which ended in her being delivered of a child, of which he acknowledged himself the father. The plaintiff defrayed the expenses of her delivery, &c. The illicit intercourse was never carried on in the plaintiff's house. There was no evidence that the husband and wife had ever met during a period of two years previous to the birth of the child; but it was proved that it was physically possible that they might have met. Under these circumstances, it was contended on the part of the defendant, that the action was not maintainable, inasmuch as the plaintiff's daughter, being a married woman, and liable at any moment to be claimed by her

husband, was not competent by law to enter into any contract of hiring and service with her father, and could not in point of law be regarded as a servant, so as to give the plaintiff a right to her services, and to support his allegation of *servitium amissit*. The learned Judge overruled the objection, but reserved the point, and the plaintiff obtained a verdict, with 10*l.* damages, with leave for the defendant to move to enter a nonsuit.

Jessopp now moved accordingly, and renewed the objection. The plaintiff cannot maintain this action, unless his daughter was legally his servant, at the time when the seduction took place. Now, the daughter being a married woman, liable at any moment to be removed from her father's house by her husband, and to be subjected to the marital control, was not *sui juris*, or competent to enter into any contract of hiring and service. She did not, therefore, stand in the legal relation of servant to her father, in which case the latter had no right to her services, and cannot maintain an action for the loss of them. No wages were paid by the father to the daughter, which is a circumstance in itself almost conclusive to shew that the relation of master and servant did not subsist between them. Then as the plaintiff cannot recover for the loss of service, neither can he for the expenses incurred by the birth of the child, for *he* was not liable to pay them, but the husband, who it was proved, might have had access to his wife at any period during their separation, and who must therefore, in the eye of the law, be presumed to be the father of the child. The relation of parent and child will not avail, unless there is a *bonâ fide* relation of master and servant subsisting; for a parent, in that character merely, cannot support an action for the seduction of his daughter, as has been repeatedly decided (*a*): but a master, in that character merely, though he does not stand in

(*a*) See 9 Co. Rep. 113 a.; Sir N. P. C. 233; 3 Burr. 1878; 2 T. Raym. 259; 5 East, 45; 2 Chit. Rep. 260; 1 Smith 333. T. R. 168; 5 T. R. 360; Peake,

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the relation of a parent, may maintain an action for debauching his servant (*a*), because, the very gist of the action is the loss of service, and it is maintainable only in respect of the injury thereby sustained by the master. The present case presents a perfectly new question, and one that seems worthy of grave and deliberate consideration. The two cases which come the nearest to the present, are those of *Irwin v. Dearman* (*b*), and *Edmonson v. Machell* (*c*), the latter of which was cited in the former. It was held in the first that in an action on the case for the seduction of an *adopted* daughter, and servant, increased damages might be given on the ground of the servant's being the *adopted* daughter of the plaintiff: and in the latter, that an *aunt*, being *in loco parentis*, might maintain trespass for assaulting her niece and servant. But in both those cases, it was clearly made out, that the injured party was acting *bonâ fide*, in the capacity of servant to the plaintiff, and was capable of entering into an engagement for that purpose: here there was no *bonâ fide* relation of master and servant in point of fact, and the daughter was not capable of contracting such a relation in point of law. The argument of the present Lord Chief Justice of this Court, then at the bar, in *Irwin v. Dearman*, deserves great weight. He urged "that the allowing an action of this description, even by a legitimate parent, was an anomalous case; as enabling one person to recover damages for injury done to another: and the extension of the remedy to an action by an aunt with whom the niece was living, was very much doubted at the time. At least, that could not be called into precedent for a further extension of the principle." Now, to allow the present action, will be a still greater anomaly, and will be to extend the principle far beyond that case, because it will be giving the remedy to a father whose parental rights and liabilities, *quoad* his daughter, have all merged in her husband, who is the only

(*a*) See *Style*, 398; *Peake's*, (b) 11 *East*, 23.
 N. P. C. 55. (c) 2 T. R. 4.

person liable for the acts, and bound to protect the interests of his wife. The result, besides, will be manifestly unjust; for as the defendant is clearly liable to the husband in an action for criminal conversation, the effect of holding this action maintainable, will be to impose upon a man two several fines, payable to two several parties, for one and the same offence. It is submitted, that to do this will be going further than the courts have ever yet gone, and that the point ought at least to undergo discussion, before so important a decision is arrived at.

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Lord TENTERDEN, C. J.—I am of opinion that this action is maintainable. It is a very common circumstance in this country, for married women to earn a subsistence apart from their husbands, by hiring themselves as domestic servants in various capacities. I am not aware that their ability to do so has ever been questioned, and it might be productive of great inconvenience if it were; for in the humbler walks of life, it may often be necessary for the husband and wife to seek their maintenance in separate services. Where a married woman enters into a contract of hiring and service apart from her husband, she nevertheless continues subject to his control, and the contract may be defeasible by him, by his, at any moment, chusing to renew the exercise of his marital rights. That may be the case *quoad* the husband; but it by no means follows that the rule would extend to third persons, especially wrongdoers, and that they should be allowed to say that such a contract is void. Here the wife was performing the duties and filling the character of a domestic servant. It is said that she received no wages. In money certainly she did not; but wages do not necessarily consist in money payments: and as she and her children were maintained by her father, I think she did receive such a compensation for her services as may, under the circumstances of this case, be fairly considered as wages. I agree that the contract between the wife and her father, would not have been binding as against the husband, if he

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had thought proper to repudiate it by resuming his marital rights; but I think it was binding as against a stranger and a wrongdoer, and that it does not lie in the mouth of this defendant, who is a stranger and a wrongdoer, to set up the invalidity of such a contract as a defence to an action like the present. Upon this short ground, I am of opinion that the verdict was right, and that we ought not to grant the rule now prayed for.

The other Judges concurred.

Rule refused.


NOWELL v. ROAKE, and others.

In trespass for entry, expulsion, and mesne profits; the defendant, pleads that A., plaintiff's (nominal) lessee, impleaded defendant for the same trespasses in C. P. and had judgment against him of *nil capiat per breve*. Replication, that error was brought in K. B., where it was awarded that judgment should be reversed and that A. should recover his term and damages. Rejoinder, stating, as

inducement, that the writ of error was returnable before judgment was given in C. P., *absque hoc*, that after the giving of the judgment, below, the record was brought into K. B. by virtue of writ of error. Held: that it was sufficient in support of the issue taken upon this traverse, to prove, by the return to the writ of error, that the transcript was brought into this Court after the taxation of costs in C. P.

In this action the plaintiff may recover the costs of the reversal of a judgment in ejectment for the defendant, as between attorney and client.

TRESPASS. The declaration stated that defendants, on the 11th July, 1811, with force and arms, broke and entered into one undivided moiety of two water corn-mills, &c., situate, &c., in the parish of Godalming, in the county of Surrey, and then and there ejected, expelled, &c., the plaintiff from his possession, use, occupation, and enjoyment thereof; and kept and continued him so ejected, expelled, &c., until and upon 29th September, 1826, and during all that time there took, had, and received, to the use of them, the said defendants, all the issues and profits of the said undivided moiety of the said tenements, being of great yearly value, to wit, &c., whereby the plaintiff, during all the time aforesaid, not only lost and was deprived of the issues and profits of the said undivided moiety, but was forced and obliged to lay out and expend, and did necessarily lay out and expend, divers large sums of money, amounting, &c., in and about the recovery of the said undivided moiety. Pleas; first, not guilty; secondly, not guilty within six years; thirdly, *actio non*; because, they

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say, that heretofore, to wit, in Trinity term, in the 57th year of the reign of his late majesty, king *George* the 3rd, in the court of his said late majesty, before the Right Honourable Sir Vicary Gibbs, Knight, and his companions, then his majesty's Justices of the Bench, at Westminster, in the county of Middlesex, the said plaintiff impleaded the said defendants and one *Elizabeth Roake*, since deceased, in a certain plea of trespass and ejectment of farm, upon certain supposed demises made by the said plaintiff and one *William Atkinson* to *John Denn*, for the recovery of certain supposed terms then to come, of and in the very same identical one undivided moiety, of and in the same identical two water corn mills, &c., in the declaration in this suit mentioned, *and for the very same identical trespasses in the said declaration in this suit mentioned*; and such proceedings were thereupon had in the said Court of our said lord the king of the Bench at Westminster, aforesaid, in that plea, that afterwards, to wit, in Trinity term, in the 6th year of the reign of our lord the now king, upon all and singular the premises being seen, and by the said justices there fully understood; it appeared to the said justices there, that said defendants and said *E. R.*, since deceased, were not, nor were any or either of them guilty of the trespasses and ejectment laid to their charge, or any part thereof in manner and form complained against them; and it was therefore considered in and by the said Court that the said *John Denn* should take nothing by his said writ, but be in mercy for his false complaint against the said defendants and the said *E. R.*; *and that said defendants und said E. R. should go thereof without day.* And it was further considered in and by the said Court, that they, the said defendants and the said *E. R.*, should recover against the said *John Denn* 176*l.* 5*s.* for their costs and charges, by them laid out about their defence, in that behalf, by the said Court of our said lord the king of the Bench adjudged to them the said defendants and the said *E. R.*, with their assent, according to the form of the statute in such case made and provided; whereof the said *John Denn* was

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convicted (*a*), as by the record and proceedings thereof still remaining in the said Court of our said lord the now king of the Bench, at Westminster, will more fully and at large appear, *which said judgment still remains in full force and effect, not reversed, satisfied, or made void.* And this, &c., verification by the record and prayer of judgment. The fourth plea differed from the third, in omitting the words in italics (*b*). Replication, joining issue on the first, and taking issue on the second; and as to the third plea *precludi non*—because, protesting that the said last-mentioned plea and the matters therein contained are wholly insufficient in law; protesting also, that the said plaintiff did not implead the said defendants and the said *E. R.* in the said plea of trespass and ejectment of farm, in the said third plea mentioned, for the very same identical trespass and ejectment, as in the declaration in this suit mentioned, in manner and form as the said defendants have above in their said third plea in that behalf alleged: for replication in this behalf the said plaintiff saith, that after the giving of the said judgment in the said third plea mentioned, and before the exhibiting of the bill aforesaid, to wit, on the 13th day of June, in Trinity term, in the sixth year of

(*a*) This appears to be an extraordinary plea. It assumes that *A.*, a plaintiff in trespass *quare clausum fregit*, may be barred by a judgment against *B.*, a party claiming to be entitled to recover damages in respect of the same trespass, as lessee of *A.*; whereas, if *A.* is entitled to recover in respect of an injury done to *his* possession of his own moiety, it is evident, that no other person could have been entitled to sue in respect of possession of that moiety during the same period. Besides which, the possession of *A.* is admitted by the plea. The judgment against *B.*, therefore, is perfectly consistent with *A.*'s right of action; whereas a judgment *in favour* of *B.* would

negative *A.*'s right; supposing the judgment, whether for or against *B.*, were not wholly immaterial or irrelevant, as being *res inter alios acta*.

(*b*) The fourth plea, by omitting to aver the identity of the trespasses, seems to be still less relevant than the third plea.

The omission of the *eat inde sine die*, appears to be immaterial.

As to the omission of the averment, "that the judgment remains in force," see *Bell v. Bolton*, 1 Lutw. 450; 1 Wms. Saund. 330. n. (5); Com. Dig. Pleader, 2 W 12, where Lutw. 600 (*Denton v. Evans*), is cited, in the report of which case, however, nothing appears upon this point.

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the reign of our said lord the now king, the record and proceedings in the said third plea mentioned, were brought into the Court of our lord the now king, before the king himself at Westminster aforesaid, by virtue of a certain writ of our said lord the king, for correcting errors therein. And such proceedings were thereupon had in the said Court of our said lord the king, before the king himself at Westminster aforesaid, that afterwards and before the exhibiting of the bill aforesaid, to wit, in Trinity term, in the seventh year of the reign of our said lord the king, the said *John Denn* having assigned errors in the record and proceedings aforesaid, and the said defendants having appeared and joined in error thereupon, it was then and there considered, amongst other things, in and by the said Court of our said lord the king, before the king himself at Westminster aforesaid, that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, should be reversed, annulled, and altogether held for nothing, and that the said *John Denn* should recover against said defendants his term then to come, of and in the said undivided moiety of the said tenements and premises, with the appurtenances in said declaration in this suit mentioned (a). As by the record and proceedings thereof still remaining in the said Court of our said Lord the king, before the king himself at Westminster aforesaid, more fully appears; which last-mentioned judgment of reversal still remains in full force and effect, not in any wise reversed or made void. And this, &c., (verification by the record and prayer of judgment and damages. Similar replication to fourth plea. Rejoinder to replication to third plea, *actio non*, because they say that the said supposed writ of error, in the said third replication mentioned, was issued and returnable in the

(a) As the replication to the third plea admits the identity of the trespasses, if there were any privity between the plaintiff in this action and *John Denn*, the judgment of reversal and recovery in K. B. would rather tend to shew a subsisting judgment for the same cause of action, and might, perhaps, be considered as giving the defendants a somewhat better case than they had made out for themselves.

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said Court of our said lord the king, before the king himself, before the term in which the said judgment of the said Court of the Bench was given, that is to say, the same writ of error was returnable in Easter term, in the eighth year of the reign of our said lord the king; and the said judgment of the said Court of the Bench was given and obtained in Trinity term in that year; *without this*, that after the giving the said judgment in the said third plea mentioned, the record and proceedings in the said third plea mentioned, were brought into the said Court of our said lord the king, before the king himself, by virtue of the said supposed writ of our said lord the king, for correcting errors therein, in manner and form as the said plaintiff hath, in his said replication to the third plea alleged: and this, &c., verification and prayer of judgment. Similar rejoinder to replication to fourth plea. Sur-rejoinder, taking issue on the traverses in the rejoinders. At the trial before *Park, J.*, at the last assizes for the county of Surrey (a), the plaintiff, in support of the issues on the special traverses, produced the return made by the Chief Justice of the Common Pleas, to the writ of error, shewing that the transcript was brought in after the taxation of costs. Evidence was also given of the costs in error, and of the costs attending the execution of the writ of *habere facias possessionem*, as between attorney and client. It was objected for the defendants that the issues on the traverses ought to be found for the defendant, inasmuch as the writ of error was sued out before the costs were taxed and judgment signed in the Court below: and that no costs are given by statute upon a judgment of reversal. The learned Judge having overruled these objections, a verdict was found for the plaintiff, with 510*l.* damages.

Gurney now moved for a rule to shew cause why a verdict should not be entered for the defendant on some of the issues, or why the damages should not be reduced by 210*l.*,

(a) Counsel for the plaintiff, defendants, *Gurney* and *Chitty*.
Marryat and *Barneswall*; for the

being the amount of the costs in error. The defendants moved to quash the writ of error (*a*), but came too late, having, before the application, joined in error. Error is now pending in the House of Lords. The writ of error having been brought prior to the judgment in C. P., that issue ought to have been found for the defendants (*b*). [*Bayley, J.* It is no matter when the writ of error was sued out. A judgment in C. P. of Trinity term might have been reversed upon it. It is all right]. Then as to the 210*l*. the defendant ought not to be required to pay costs occasioned by the error of the court. Costs are not given by the statute. [*Bayley, J.* The question is, whether they are not damages sustained by the plaintiff, by reason of his being wrongfully kept out of possession]. In *Bell v. Potts* (*c*), it was held, that where the plaintiff recovered a verdict, and had judgment in the Common Pleas, as the judgment was reversed in this court, the defendant could not have costs. [Lord *Tenterden, C. J.* We are taking it for granted, that a court of error could not give costs]. The verdict included costs as between attorney and client. If after the plaintiffs had recovered judgment in this cause, the judgment of reversal in this court should be reversed in the House of Lords, there would be actions backwards and forwards. [*Bayley, J.* Upon such reversal you might have an *auditâ querelâ* (*d*), to restore you to what you had lost in the present action.]

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(*a*) See the argument in this Court upon the writ of error brought upon the special verdict, 8 D. & R. 514, and 5 B. & C. 720, and the motion to quash the writ of error, on the ground that it was returnable before judgment given in the Court below, 5 B. & C. 735, *n*.

(*b*) This objection seems to assume, that the inducement to the special traverse, was in issue.

(*c*) 5 East, 49.

(*d*) As to which, see Co. Litt. 100 *a*; F. N. B. 104 B., 233 A., 237 I., 239, 240 B.; Fitz. Brief,

pl. 628; Error, pl. 66; Proces, pl. 129, 160; Severance, pl. 23; Bro. Damages, pl. 38; Executors, pl. 42; Dyer, 194 *a*, 297 *b*; 5 Co. Rep. 86; Fra. Moore, 536, 811; Crd. Eliz. 4, 233; Cro. Jac. 29; Hob. 2, 383; 2 Bulstr. 97, S. C.; Finch Law, 488, 9; Sir W. Jones, 90, 377, 378; H. 2 H. 4, fo. 17, pl. 28; Longo Quinto, 118; M. 2 R. 3, fo. 1, pl. 3; 1 Sid. 351; 1 Roll. Abr. 306 (B) pl. 6, 7, 8, 10, (C) pl. 1, 2, 4, 582, 604; 1 Salk. 92, 93, 264; 1 Lord Raym. 439; 1 Mod. 111, 170; Gibb. C. B. 103,

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LORD TENTERDEN, C. J.—These costs are the consequence of keeping the plaintiff wrongfully out of possession. I see no objection to the plaintiff's recovering them, as between attorney and client. Here, they could not be taxed at all.

BAYLEY, J.—The pendency of a writ of error in the House of Lords does not vary the case. The Plaintiff always has the costs of the writ of possession.

The other Judges concurring,

Rule refused.

The KING v. The INHABITANTS of the Township of
 FYLINGDALES.

Under the Highway Act, 13 Geo. 3rd c. 78, s. 2, a justice of the peace cannot present a road out of repair, upon the information of any other surveyor of highways than the surveyor of highways appointed for the particular parish, township, or place, where the road lies.

THE presentation stated, that *John Wharton*, esquire, one of his Majesty's justices, &c., upon information upon oath of *William Raine*, the surveyor of the highways for the township of *Thornton le Beans*, in (a) the North Riding in the county of York, which township is 35 miles distant from the township of *Fylingdales*, did present that on the 1st day of July, 1826, and long before, there was, and from thence continually had been, and still was, a certain common king's highway, leading from the town of *Sneaton*, in the said riding, towards and to the market town of *Scarborough*, in the said riding, used for all the liege subjects of our said lord the king to go, return, pass, and repass,

3d edition; 4 Burr. 2287; 2 Stra. 1197; 1 Wils. 98; 2 Marsh. 37. And see the proceedings on an *audita querela*, between *Dr. Bancroft* and *Sir Edward Heron*, Ball's MSS. 139; 1 Burt. 296; and between *Lord Forchester* and *Petrie*, 2 Wms. Saund. 148, b. And see the forms, Co. Ent. 87 a, 88, 91, 238; Aston; Ent. 136, 142; Herne, 52, 56; Towns. Judgm. 3, 6, 7; Hans. Ent. 140, 156, 159; 3 Lord

Raym. 335; 2 Sell. Pra. 254. And for practical directions, see *Lee*, Dict. Pra. 126.

(a) The words in *italics* were directed to be inserted by an order for amending the record, made at York, by Mr. J. Bayley; but the amendment having been omitted to be made in the *Nisi Prius* record, the motion in arrest of judgment proceeded upon the record in its original form.

on foot and on horseback, and with cattle, carts, and carriages, at their will and pleasure; and that a certain part of the said king's highway, situate and being in the township of Fylingdales, in the said riding, beginning at a certain gate in the said highway called Red Gate, situate, &c., and extending from thence, in a south-eastwardly direction, towards, &c., and containing in length divers, to wit, 7553 yards, in breadth divers, to wit, four yards, on the said 1st day of July, 1826, and from thence continually until this day, at the said township of Fylingdales, was, and still is very ruinous, miry, deep, broken, and in great decay, for want of needful and necessary reparation and amendment thereof, so that the liege subjects of our said lord the king, through the same way, with their horses, coaches, carts, and carriages, could not, during the time last aforesaid, nor yet can, go, return, pass, and re-pass, ride, and labour, without great danger of their lives and loss of their goods, to the great damage and common nuisance of all the liege subjects of our said lord the king, through the same way going and returning, passing and repassing, riding and labouring, against the form of the statute, &c., and against the peace, &c. The second count omitted the termini of the road. The third count stated that Fylingdales repaired the roads within it, and that the road was within Fylingdales. Plea, not guilty.

This presentment having been removed into the court of King's Bench by *certiorari*, came on to be tried at the last Spring assizes for the county of York, before *Bayley, J. (a)*; when the defendants were convicted. In Easter term, *J. Williams* obtained a rule, calling upon the prosecutor to shew cause why the judgment should not be arrested, on the following grounds:—first (*b*), that the presentment did not allege that the surveyor's information upon oath, was made before the presenting justice; secondly, that the

(a) Counsel for the prosecution, *Scarlett* and *Alexander*; for the defendant, *J. Williams* and *Starkie*.

(b) This objection would not be

removed by the amendment (*ante*, 176 note (a)), though it would assume a somewhat different shape.

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surveyor of the highways, upon whose oath the presentment was founded, was described as the surveyor of the highways in the North Riding of Yorkshire, and not of any particular parish or township.

Alexander (with whom was *Scarlett*, A. G.), now shewed cause. The question intended to be raised is, whether the surveyor of a parish, township, &c., has a right to present a highway lying out of such parish, &c. The books contain no case upon the subject, and the question, therefore, depends upon the construction of the 24th section (a) of the Highway Act, (13 *Geo.* 3, c. 78). Now

(a) "Every justice of assize, justices of the counties Palatine of Chester, Lancaster, and Durham, and of the great sessions in Wales, shall have authority by this statute, upon his or their own view, and every justice of the peace, either upon his own view, or upon information upon oath to him given, by any surveyor of the highways, to make presentment, at their respective assizes or great sessions, or in the open general quarter sessions, of such respective limit, of any highway, causeway, or bridge not well and sufficiently repaired and amended, or of any other default or offence committed and done contrary to the provision and intent of this statute, and that all defects in the repairs thereof, shall be presented in such jurisdiction, where the same do lie, and not elsewhere; and that no such presentment, nor any indictment for any such default or offence, shall be removed by *certiorari*, or otherwise, out of such jurisdiction, till such indictment or presentment be traversed, and judgment thereon given, except where the duty or obligation of repairing the said highways, causeways, or bridges,

may come in question; and that every such presentment made by any such justice of assize, counties Palatine, great sessions, or of the peace, upon his own view, or upon such information having been given, to such justice of the peace, upon the oath of such surveyor of the highway as aforesaid, shall be as good, and of the same force, strength, and effect in the law, as if the same had been presented and found by the oaths of twelve men; and that for every such default or offence so presented as aforesaid, the justices of assize, counties Palatine, and great sessions, at their respective courts, and the justices of the peace at their general quarter sessions, shall have authority to assess such fines as to them shall be thought meet: saving to every person and persons that shall be affected by any such presentment, his, her, or their lawful traverse to the same presentment, as well with respect to the fact of non-repair, as to the duty or obligation of repairing the said highways, as they might have had upon any indictment of the same, presented and found by a grand jury; and the justices of the peace at their

the expression there used is sufficiently extensive to authorize the right contended for, unless it be limited either by other sections of the same act, or by strong grounds of convenience or inconvenience. But all the other sections of the statute, from which the surveyor derives his authority to act, do in express terms confine such authority to the particular district for which he is appointed, ss. 12, 25, 27, 41, and 63. So also in the 1st sect. of 54 Geo. 3, c. 109. If, therefore, it had been the intention of the legislature so to confine his power in this particular respect, they would have used the same restrictive expressions. The arguments of convenience or inconvenience are in favour of the presentment as it stands. Many cases might be put, in which the beneficial exercise of his duty would be materially promoted, by investing a surveyor with the power contended for; e. g. the inability, from illness or other causes, of a presenting magistrate to view, or of the particular surveyor to inform; and no inconvenience can arise from it, inasmuch as the surveyor's information must ultimately be canvassed before a jury. It is, therefore, immaterial what surveyor presents; and as the extended interpretation will facilitate the amending and keeping in repair the public highways of the country, which is the declared object of the Highway Acts, the Court will, of two indifferent constructions, adopt that best calculated to promote such an end. [*Bayley, J.* Could a surveyor act out of the county?]

J. Williams, contra. In a question of jurisdiction, the magistrate must bring himself within the provisions of the statute. This is familiar to the Court, in cases of conviction. (Here the Court stopped him).

general quarter sessions, or the major part of them, may, if they see just cause, direct the prosecutions upon such presentments as shall be made at the quarter sessions, as

aforesaid, to be carried on at the general expense of such limit, and to be paid out of the general rates within the same."

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LORD TENYARDEN, C. J.—We are all of opinion, that his not being shewn to be a surveyor of the particular district is fatal. In all other parts of the act this is expressly required.

BAYLEY, J.—“Surveyor,” must mean the surveyor of the district.

HOLROYD, J.—The words “any surveyor,” must be understood with reference to the subject matter.

Rule absolute.

CHARLES ASHBY v. ANN ASHBY and THOMAS ASHBY,
Executrix and Executor of CHARLES ASHBY, deceased.

A count in assumpsit for money had and received by defendant, as executor, to the use of plaintiff, cannot be joined with a count for money due to plaintiff from defendant, as executor, upon an account stated with him of money due from him as executor.

Quere, whether the latter count can be joined with a count for money paid by plaintiff, to the use of defendant, as executor.

INDEBITATUS ^{7150 244} *assumpsit* on the money counts. The first count was for money paid by the plaintiff to the use of the defendants, as executrix and executor. The second was for money had and received by the defendants, as executrix and executor, to the use of the plaintiff. And the third was for money due to the plaintiff from the defendants, as executrix and executor, upon an account stated with them as executrix and executor of money due from them, as executrix, &c. Demurrer to the declaration, assigning for cause, that the plaintiff in the declaration complained of defendants as executrix and executor, whereas he ought to have declared against them in their personal character only; and that it appeared by the declaration that the defendants could not owe the money demanded of them, to the plaintiff, inasmuch as he sued them as executrix and executor (a). Joinder in demurrer,

(a) The grounds of demurrer as stated in the margin of the paper books, were, first, that the first and second counts of the declaration, or, at least the second, if tenable at all, charged the defendants person-

ally, while the third count charged them in their representative character: and therefore that the declaration was bad for a misjoinder of counts: and secondly, that the first two counts were bad, for charging

Miller, in support of the demurrer. This declaration is bad upon two grounds; first, there is a misjoinder of counts; secondly, there is not a sufficient consideration shewn. First, all the counts aver the promises to have been made by the defendants as executors; but the first and second charge the defendants personally, and the third charges them in their representative character. The counts, therefore, will not admit of the same pleas being pleaded to them all: nor will they all sustain the same judgment; for the judgment upon the first two, would be *de bonis propriis*; and the judgment upon the third, would be *de bonis testatoris*. With respect to the first count, which is for money paid, no case can be found in which it has been expressly decided, whether an action against an executor for money paid to his use, as executor, can or cannot be sustained, so as to charge him *de bonis testatoris*. But there are many authorities to shew that an action against an executor for money lent to him as executor, cannot be sustained so as to charge him *de bonis testatoris*. *Rose v. Bowler* (a); *Powell v. Graham* (b). Now, the principle appears to be the same with respect to the action for money paid; for what difference is there between a man lending money to an executor, to be paid for the purposes of his testator, and paying money, at an executor's request, for the purposes of his testator? In each case, there is a new contract entered into, subsequent to the death of the testator; and under such a contract an executor can be liable only in his personal character. Here, the first count raises a perfectly new cause of action, wholly unconnected with the testator, and which did not exist at the time of his death. It is different from a promise on an account stated, because there no new cause of action is raised; it is but a promise to pay

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the defendants as executrix and executor, whereas the only judgment such counts could sustain, would be *de bonis propriis*.

(a) 1 H. Bl. 109.

(b) 7 Taunt. 580, 1 J. B. Moore, 305, S. C. And see *Ellis v. Bowen*, Forrest, 98.

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a subsisting debt: and even in the case of an account stated, if it were of money received by the executor, as such, and not due at the time of the testator's death, he would be personally liable, because then a new cause of action would be raised, and not a subsisting one acknowledged. A count in *assumpsit* against husband and wife, administratrix with the will annexed, on promises by the testator to pay rent, cannot be joined with counts on promises by the husband and wife, as such administratrix, for use and occupation by them, after the death of the testator; as in the one case the defendants were personally liable, while in the other, they were only so to the extent of assets. *Wigley v. Ashton (a)*. Executors are liable personally on a promissory note drawn by them, as executors, *Child v. Monins (b)*; because it is a new contract on their part, to which their testator was no party. In every case in which it has been held that executors might be charged in their representative character, it will be found that there was an obligation on the part of the testator, arising from an actual or implied contract of his own. The assets cannot be bound by a new contract of the executor, entered into after the testator's death; for the executor has no power to make the testator contract, as it were, a new debt; it is the duty of the executor to pay the debts owing when his testator died, and if he contracts fresh ones, he must be personally responsible for them. Upon these authorities and principles, it seems clear that the first count charges the defendants personally, and would sustain a judgment *de bonis propriis* only, and therefore, cannot be joined with the third count, which charges them in their representative character, and would require a judgment *de bonis testatoris*. Then the second count, which is for money had and received, is clearly open to the same objection; and so decisive are the authorities upon this point, that it seems unnecessary to argue it upon

(a) 3 Barn. & Ald. 101.

(b) 5 J. B. Moore, 282, 2 Brod. & Bingh. 460, S. C.

principle. *Rose v. Bowler* (a); *Jennings v. Newman* (b); *Brigdon v. Parkes* (c); *Powell v. Graham* (d); 2 *Wms. Saund.* 117 d. It must, indeed, be admitted, that there are cases in which it has been held that executors might sue, as such, for money had and received, money paid, and money lent; *Petrie v. Hannay* (e); *Cockerill v. Kynaston* (f); *Ord v. Fenwick* (g); *Webster v. Spooner* (h); but even in those cases, the distinction already pointed out between contracts made by executors after the death of their testator, and those made by the testator himself, in his life-time, is attended to; and in one of them (*Petrie v. Hannay*) it was expressly held that a plaintiff cannot join in the same declaration, a cause of action as executor, with another which accrued in his own right. The older cases upon the subject proceed upon the same principle, and in one of them the same distinction is laid down with great clearness, with reference to the question of costs. In *Nicolas v. Killigrew* (i), the rule was thus laid down by *Treby, C. J.*, and *Powell, J.* "In all cases where an executor or administrator sues for a debt or other thing belonging to the testator, &c., and grounds his action upon the same contract that was to the testator, he shall not pay costs if he fail in the suit; but if he grounds his action upon a contract expressed, or by implication, and operation of law, which accrues to him after the death of the testator, there the action lies in his own name, and the naming him executor, &c., is void, and he shall pay costs." Then as both the first counts would sustain a judgment *de bonis propriis*, they cannot be joined with the third, which being for money due from the defendants, as executors, upon an account stated with them, as such, will, according to the case of *Powell v. Graham* (k), support a judgment *de bonis testatoris*, only. It may be contended on the other side, that

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(a) 1 H. Bl. 108.

(b) 4 T. R. 347.

(c) 2 B. & P. 424.

(d) 7 Taunt. 580, 1 J. B. Moore, 305, S. C.

(e) 3 T. R. 659.

(f) 4 T. R. 277.

(g) 3 East, 104.

(h) 3 Barn. & Ald. 360.

(i) 1 Lord Raym. 437.

(k) 7 Taunt. 580, 1 J. B. Moore, 305, S. C.

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Rose v. Bowler (a), and *Brigdon v. Parkes* (b), are cases warranting the position that on such a count the defendants may be held personally liable. But *Gibbs*, C. J., in his judgment in *Powell v. Graham*, meets that difficulty, and reconciles these apparently opposite cases, for he says, "Where the money was due from them only as executors, as having been received by their testator, there the judgment would be *de bonis testatoris*; but if the money accounted for had been received by themselves, although as executors, there it would be a new contract, which would render them personally liable." Secondly, even if there is no misjoinder of counts here, still the declaration is bad, for not shewing upon the face of any one of the counts a sufficient consideration for the alleged promises by the defendants. The defendants are sued as executors, and to render them personally liable for a debt due from them as executors, there must be a sufficient consideration alleged in the declaration. The words, *as executors*, cannot be rejected as surplusage (c); and the very nature of the only debts which could be due from the defendants, as executors, in the form described in the declaration, shews clearly that the plaintiff has no cause of action at law, and that his only remedy, if any, is in equity.

Jessopp, contra. There is no misjoinder of counts here, for the same plea of *plene administravit* might be well pleaded to them all. It was decided, in *Ord v. Fenwick* (d), that a count on an assumpsit to the plaintiff, as executrix, for money paid by her to the defendant's use, might be joined with another count on promises made to the testator; and the same rule ought to apply in actions against, as in actions by, executors. It is admitted, that it has never been decided, that a count for money paid to the use of an executor, as executor, cannot be joined to another count for money due from an executor, on an account stated with him as executor; and in *Powell v.*

(a) 1 H. Bl. 109. *Et vide*
Sacer v. Atkinson, *ib.* 102.

(b) 2 B. & P. 424.

(c) See Com. Dig. Pleader, C.
29; Bac. Abr. Plead, I. 4.

(d) 3 East, 104.

Graham, where all the cases upon the subject were reviewed, and, as it should seem, reconciled, *Gibbs*, C. J., said, "A count on a promise made by the defendant as executor, has no force farther to charge the defendant than a count on a promise of the testator. In several cases, the defendant has been charged as promising as executor, and yet he has been held liable *de bonis propriis*; but that is, because in those cases the nature of the debt has been such, as necessarily made the defendant liable *de bonis propriis*. For example, where there has been a count against him for money had and received by him as executor, if he receives the money, he must be personally liable. So, of money lent. So, of money due on an account stated. But this proposition must be confined to the case of an account stated of money received by himself personally. If this distinction be attended to, it preserves all the cases from the charge of inconsistency. Every case, though apparently discrepant, may be reconciled in this mode." Here the count, on an account stated, evidently applies to money received personally by the defendants; for it is for money in which the defendants, as executors, were indebted to the plaintiff, on an account stated with them as executors, of monies due from them as executors; therefore they are personally liable on that count: and if so, then, on the authority of that case, it would seem to follow, that the first two counts of this declaration, which, it is contended on the other side, charge the defendants personally, may well be joined with the third.

LORD TENTERDEN, C. J.—I am of opinion that the Court *must* pronounce judgment for the defendants, on the demurrer in this case. To the last count of this declaration, the plea of *plene administravit* would clearly be a good plea; and that count would as clearly support a judgment *de bonis testatoris*: the question is, whether the other counts are so framed, that they can properly be joined with the third. If it were necessary, on the present occasion,

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to decide that question with reference to the first count, I should feel great difficulty in saying that the objection made against it ought to prevail; for, as at present advised, I strongly incline to the opinion, that the count is good; that it would sustain a judgment *de bonis testatoris*, and that *plene administravit* might be well pleaded to it. But it is not necessary to come to any decision upon the first count; because the authorities shewing that the second count cannot be joined with the third, are so numerous, and so decisive, that I feel it impossible to get over them. If the question as to the second count were *res integra*, I am not prepared to say, that I should express the same judgment upon it as I am now expressing; but I do not feel myself at liberty to overrule the current of authorities upon the subject. The second count clearly charges the defendants personally, and the plea of *plene administravit* would be no answer to it: and then, according to decided cases—for I give no opinion of my own upon the point—it cannot be joined with the third count, which charges the defendants in their representative character. Upon that short ground, therefore, we are bound to hold that this declaration is bad, and that the defendants are entitled to judgment.

BAYLEY, J.—I do not know how to get over the authorities in favour of the defendants in this case: otherwise I should be strongly disposed to say that all these counts are good. My reason is not convinced by the decisions the other way; but they are so strong, that I feel myself, however reluctantly, bound by them.

HOLROYD, J., concurred.

LITLEDALE, J.—I have considerable doubt whether the first count is not good; but as the second is bad, according to all the authorities, our decision need not go beyond that: and I confess that it seems to me the

authorities are so far right ; for I do not see how the second count; which charges the defendants personally, can be joined with the third, which charges them as representatives merely.

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Judgment for the defendants, on demurrer (a).

(a) And see *Perrott v. Austin*, 315; *Atkins v. Hill*, Cowp. 284; Cto. Ejz. 232; *Wheeler v. Collier*, *ib.* 406; *Herrenden v. Palmer*, Hob. 88; *Scott v. Stevens*, 1 Sall. 89; *Davis v. Reyner*, 2 Lev. 3; *Forth v. Stanton*, 1 Samd. 210; *Jenk. 296*, pl. 49; *Wallis v. Lewis*, 2 Ld. Raym. 1215; *Betts v. Mitchell*, 10 Mod. 315; *Brown v. Dison*, 1 T. R. 276; *Goldthwaite v. Petrie*, 5 T. R. 234; *Ram v. Hughes*, 7 T. R. 350, n; *Worrall v. Hand*, Peake, N. P. C. 73; *Catherwood v. Chaboud*, 2 D. & R. 271, 1 B. & C. 151. Com. Dig. Administration, B. 14, 15, Pleader, 2 D. 2; Toller, 459.

HUMPHREYS v. MEARS.

CASE, against defendant, one of the trustees of the roads, in a parish in the county of Montgomery, for negligently conducting the alteration of one of the public roads within the parish ; whereby plaintiff fell from one part of the road to another, and broke his leg. The declaration contained two counts ; one, charging the defendant as trustee, and the other not. Plea, not guilty, and issue thereon. At the trial before *Warren, C. J.*, and *Jervis, J.*, at the last great sessions for the county of Montgomery, the case was this :—The defendant was one of the trustees under the General Turnpike Act, 3 *Geo. 4*, c. 126, of the roads in the parish in question. The road in question crossed a hill, which the trustees having determined to lower, by cutting down the upper part, and filling up the lower part with the materials, had contracted with certain persons to perform the work. The contractors had accordingly commenced this work, by cutting down one

Trustees of a turnpike-road are not liable in damages for an injury occasioned by the negligence of contractors, or others, employed under them, in the performance of public works on the road ; unless they personally interfere in the management of the works.

What degree of personal interference would suffice to render them so liable ; *Quarre.*

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side of the upper part of the road, leaving the other side in its original state, for the purposes of traffic. There was, consequently, a precipice of several feet height from the level of one side of the road to that of the other, and no paling or fence of any description was placed between them. The plaintiff was returning homewards one evening, along the public part of the road, when, in consequence of the darkness, and the want of a fence, he fell over the precipice, and broke his leg; and to recover damages for this injury, the action was brought. It appeared that the defendant lived within 200 yards of the spot where the work was going on, and where the accident happened; that he was generally on the spot, overlooking the progress of the work, twice in every week; that he had occasionally given some directions respecting the work; and that he had been heard to tell the workmen to use every precaution, so as to make the road safe for the public. Upon this evidence, the learned Judges were of opinion, that the action was not maintainable against the defendant as one of the trustees of the road, but ought to have been brought against the contractors. They therefore directed a nonsuit; but, in order to save the expense of a second trial, in case the Court should think the defendant liable, they directed the jury to say, whether they were of opinion that there was negligence on the part of the defendant, and to assess the plaintiff's damages. The jury found "*negligence*," but without saying in *whom*, and assessed the plaintiff's damages at 40*l.*; and the plaintiff then submitted to a nonsuit, having leave to move to enter a verdict, with 40*l.* damages.

Corbett now moved accordingly. The nonsuit was wrong. There was quite sufficient evidence of the defendant's interference in the management of the work, to make him liable, as one of the trustees, for any injury occasioned by negligence in the performance of the work: and the jury have found that there was such negligence;

by which they must have meant negligence in the defendant, because he was the only defendant on the record. [Lord Tenterden, C. J. There was no evidence that the defendant employed the contractors, or the persons who actually performed the work; and the evidence of his interference in the management of the work was exceedingly slight.] It was proved that the defendant lived close to the spot—that he constantly inspected the progress of the work twice a week—that he occasionally gave directions to the workmen, and that he cautioned them to use every precaution to make the road safe for the public. Surely that is sufficient evidence of his interference to render him, as a trustee, liable for negligence in the performance of the work. It was held, in *Hall v. Smith* (a), that the clerks to commissioners, under a lighting and paving act, entrusted with the conduct of public works, were not liable in damages for an injury, occasioned by the negligence of artificers and labourers, employed under their authority; and in *Bolton v. Crowther* (b); that where trustees under the General Turnpike Act, 3 Geo. 4, c. 126, by improving the course of a public road, had effected a consequential injury to a private individual, whose estate abutted on the road, they were not liable to an action: but the decision in both those cases proceeded upon the ground; that the defendants had not been guilty of any negligence or misfeasance themselves; whereas, here the jury have found expressly, for their verdict could have no other meaning, that the defendant was guilty of negligence. Those cases, therefore, do not apply to the present. [Bayley, J. This action charges the defendant as upon a common law obligation; whereas his obligation is a special one, imposed by a particular act of parliament. The defendant, as a trustee of the roads, had a public duty to perform, and is not liable for the negligence of those who are employed

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(a) 9 J. B. Moore, 226, 2 Bingh. 703, S. C. And see *Harris v. Baker*, 4 M. & S. 27.

(b) 4 D. & R. 195, 2 B. & C.

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under him in the performance of that duty.] That is, undoubtedly, the law with respect to public officers, if they merely employ others to perform public works under them; but here the defendant himself interfered in the conduct and management of the work; and having chosen to interfere at all, he was bound to extend his interference so far as to see that proper means were taken to insure the safety of the public; and not having done so, he has been personally guilty of negligence, and is personally liable for the consequences.

LORD TENTERDEN, C. J.—Assuming that the defendant did not personally interfere in the management of the work, the case of *Hall v. Smith* (a), is decisive to shew that he is not liable in the present action; and I think the evidence of his interference is far too slight to take this case out of the general rule laid down in that and other cases on this subject. I am, therefore, of opinion, that we ought not to grant the rule prayed for.

BAYLEY, J.—I am of the same opinion. I cannot admit that the negligence in this case has been brought home to the defendant; the finding of the jury on that point is very equivocal: the contractors for the performance of the work were the proper persons to have been sued.

The other Judges concurred.

Rule refused (b).

(a) 9 J. B. Moore, 226, 2 Bingh.
 156, S. C.

(b) And see *Nicholson v. Moten-*
sey, 15 East, 384.

6 Dec. 29.

WATSON v. HOME (a).

COVENANT by plaintiff, as assignee of the lessee, against defendant, as lessor, of certain premises, demised by lease, of the 9th of March, 1819, from defendant to one *Prendergast*, for a term of 18½ years, and by him assigned to plaintiff, in which defendant covenanted to pay all rates and assessments then already charged, or to be charged, upon or in respect of the demised piece or parcel of ground, or any part thereof, during the continuance of the said term, or any renewed term, or upon the lessee or assignee in respect thereof. Pleas, after setting out the lease on oyer; first, *non est factum*. Second, that *Prendergast* did not assign the lease to plaintiff. Third, that nothing became due for rates or taxes charged upon, or in respect of the piece or parcel of ground so demised, or upon plaintiff as assignee in respect thereof. Fourth, that no taxes or rates were charged upon, or in respect of the said demised piece or parcel of ground, or upon plaintiff as assignee in respect thereof, at any time after the assignment thereof to plaintiff. And, fifth, that defendant had paid all rates and taxes charged upon, or in respect of the said demised ground. Issues on all the pleas. At the trial before *Littledale, J.*, at the Middlesex sittings after Michaelmas term, 1826, a verdict was found for the plaintiff, damages 5*l.* 1*s.* 6*d.*, with liberty to him to move to increase the damages; and upon such motion being afterwards made, the Court directed the facts to be stated in the following case:

By indenture of lease, dated 9th March, 1819, between defendant of the first part, plaintiff of the second part, and *L. Prendergast* of third part, defendant demised to *L. P.* all that piece or parcel of ground, situate, &c., *habendum* for 18½ years, from 25th March then next, at the yearly

Demise, by indenture, of land, for a term of years, at the rent of 79*l.* 12*s.* 6*d.*, with a stipulation that lessee should not build upon it, without the written license of lessor. Covenant by lessor to pay all taxes, then charged, or to be charged, upon, or in respect of, the land. Lessor having given his written license, of even date with the lease, for lessee to build on the land, buildings were erected, whereby the value of the estate was greatly improved, and the amount of taxes increased in proportion. Held, that lessor was liable for the amount of taxes calculated upon the rent of 79*l.* 12*s.* 6*d.*, but not for the amount calculated upon the improved value of the land, occasioned by the erection of the buildings.

(a) This case was decided at the sittings before term, but the MSS. was mislaid.

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rent of 79*l.* 12*s.* 6*d.*, which the lessee covenanted to pay "without any deduction whatsoever, except for taxes, charges, rates, and assessments, charged, or to be charged upon, for, or in respect of the said piece or parcel of ground, and paid by the said *L. P.*, or his assigns;" and then the lessee covenanted that he would not without the previous consent, in writing, of the defendant, erect, or suffer to be erected, any messuage or tenement, or other buildings, upon the demised premises.

The defendant's covenant as to taxes, upon which the action was brought, was as follows:—"And also that he the said *W. Home*, his executors, administrators and assigns, shall and will bear, pay and discharge, as well the land tax, as all other taxes, charges, rates, assessments, and impositions, parliamentary, parochial, or otherwise, already charged, or to be charged, upon, or in respect of the said demised piece or parcel of ground, or any part thereof, during the continuance of the said term hereby granted, or any renewed term or terms to be granted, or upon the said *L. P.*, his executors, administrators, or assigns, in respect thereof.

On the said 9th March, 1819, the defendant, at the time of executing the lease, signed a licence or consent for the plaintiff to build on the demised ground, as follows:—"I consent that Mr. *L. P.*, shall be at liberty to build upon the piece of ground demised to him by indenture, dated 9th March, 1819, to the extent of, and consistently with the specification and plan hereunto annexed. *W. Home*;" and afterwards fourteen messuages were built thereon accordingly, at an expense of upwards of 2,500*l.*, and to each of those messuages is attached a garden, being respectively part of the demised ground: the whole of the houses let at rents, amounting together, to 584*l.*, but subject to risk of tenant's taxes, repairs, and all outgoings, which are paid by the plaintiff.


In the year 1819, the lease was duly assigned to the plaintiff.

The plaintiff claims in respect of the following parochial rates, which he paid in the manner after stated. From Christmas 1821, to Michaelmas 1824, 152*l.* 15*s.* 6*d.*, for 2½ years, viz., the poor and church rates, the paving and watch rates, and the sewers' rate.

By the local acts of 22 Geo. 2, c. 50, s. 23, and 42 Geo. 3, c. 13, s. 22, the watch and paving rates are charged upon the occupier of any messuage, &c. By the local act of 53 Geo. 3, c. 112, s. 45, the poor and church rates are also charged upon the inhabitants and occupiers; but by s. 54 of the last act, the trustees under that act, and the trustees under the before mentioned paving act, are empowered jointly to compound for all the above rates with landlords, where the premises shall not exceed 18*l.* per annum, or where the houses are let in lodgings. The sewers' rate is assessed by the 54 Geo. 3, c. 219, ss. 7, 8, and is directed to be charged upon the occupier, and allowed by the landlord.

Immediately after the fourteen houses were completed, and the gardens fenced in, *Prendergast* the lessee, and afterwards the plaintiff as his assignee, under the 53 Geo. 3, c. 112, s. 54, entered into a composition for payment of the poor and other parochial rates and assessments on the houses and gardens; and the same were compounded for at an average of 12*l.* for each, making an aggregate sum for the whole, of 168*l.* per annum. The plaintiff proved that he had paid the taxes and rates, in respect of the houses and gardens, from Christmas 1821, to Michaelmas 1824, amounting to 152*l.* 15*s.* 6*d.*, being for 2½ years upon the said sum of 168*l.* so compounded for; and he seeks to recover the proportion of the said sum of 152*l.* 15*s.* 6*d.*, to be calculated upon the sum of 79*l.* 12*s.* 6*d.*, the rent reserved by the lease, thus, "As 168*l.* is to bear 152*l.* 15*s.* 6*d.*, so 79*l.* 12*s.* 6*d.* is to bear 72*l.* 7*s.*" It was proved that the defendant, before the lease to *Prendergast*, had been rated for the whole of the land, about fifteen acres, of which the land in question formed part, and three mes-


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suages standing thereon, at 200*l.* per annum; and that after the defendant had let off the land in question, the assessment on him had been reduced to 180*l.* per annum, in consequence of his having so underlet the land; but it being also proved that land unbuilt upon was generally rated at 5*l.* per annum per acre, which for the land in question, admitted to be $1\frac{1}{2}$ acre, would be only 5*l.* 12*s.* 6*d.*, the learned Judge directed a verdict for 5*l.* 1*s.* 6*d.* only, being the proportion of the said rent of 5*l.* 12*s.* 6*d.*: thus, "As 168*l.* is to bear 152*l.* 15*s.* 6*d.*, so 5*l.* 12*s.* 6*d.* is to bear 5*l.* 1*s.* 6*d.*." Should the Court be of opinion that the plaintiff ought to be allowed to increase the verdict only to the rates on the 20*l.* allowed to the defendant, in consequence of his underletting the land, the verdict would then be for 18*l.* 3*s.*: thus, "As 168*l.* is to bear 152*l.* 15*s.* 6*d.*, so 20*l.* is to bear 18*l.* 3*s.*."

Chitty, for the plaintiff. The erection of the buildings was clearly contemplated at the time when the lease was executed; for the licence to build was dated on the very same day with the lease. One of the covenants in the lease is, that the lessor shall pay the land tax and all other taxes already charged, *or to be charged*, upon, or in respect of, the land demised; and the question for the decision of the Court depends entirely upon the construction of that covenant. Now, the covenant is expressly to pay all future taxes, which must include all taxes calculated upon the improved rent; and then the plaintiff is entitled to claim against the defendant the full sum of 152*l.* 15*s.* 6*d.*, being the amount of taxes calculated upon the improved rent of the premises. As the lease and the licence to build are dated on the same day, they must be looked at together; and the covenant must be construed with reference to the licence to build: that is, as a covenant to pay all future taxes calculated upon the improved value produced by the erection of the buildings. It is clear that the *land* itself is more valuable now it is built upon than

it was before, and the increase in the amount of the assessment is not produced by the estimated value of the *houses* alone, added to the former value of the land, but is partly made up of the increased value of the *scite*, by its being so built upon. It is expressly found by the case, that the custom in the parish is, to assess land not built upon at 5*l.* per acre, and that the composition for the land and houses thereon in question, is an aggregate sum of 168*l.* But the land is $1\frac{1}{2}$ acre only, the assessment upon which, if there were no houses, would be 5*l.* 12*s.* 6*d.*; so that it would appear that the larger sum of 162*l.* 7*s.* 6*d.*, is assessed for the buildings at something more than 11*l.* 9*s.* upon each house, independently of the land and garden upon which it stands. It must be obvious, however, that in making up the whole assessment, it cannot be intended that the buildings shall bear 162*l.* 7*s.* 6*d.*, and the land 5*l.* 12*s.* 6*d.* only, the sum which it must have paid had not a single brick been laid upon it. The Court, then, have to fix the amount which shall be taken as the charge upon the land, in its new character of *land built upon*, which it is obvious from the statement in the case pays more in this parish than land not built upon. The difficulty is in fixing the amount, but there seems no good reason why this should not be the larger sum claimed, as the defendant has covenanted to pay all rates and assessments, *to be charged* in respect of the land; and the larger sum appears to be a reasonable proportion of the assessment upon the whole premises, which the land in its improved state ought to pay. The case of *Hyde v. Hill* (a), does not apply to the present, because in that case there was *no express* covenant by the lessor to pay, but the question turned upon the construction of the lessee's covenant, and the exception therein of the words "*except the land tax*," which the Court considered as merely subjecting the lessor to pay the *then* land tax, and not a larger land tax subsequently imposed

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(a) 3 T. R. 377.

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in consequence of the tenant's improvements. The case of *Graham v. Wade* (a), also turned on the particular terms of the deed. Here, however, the landlord *expressly* covenants to pay all rates, &c., then charged or *thereafter to be charged*, evidently contemplating the probability of a larger assessment at a future period, which the defendant covenanted to discharge: he is, therefore, liable to pay the larger sum.

Curwood, contra. This is entirely a question of construction, and in construing that which the parties have put into writing, it is necessary to take into consideration what was, according to reason and probability, their intention at the time. Trying this case by that test, the landlord must be taken to have intended to covenant to pay all rates, &c., on the land, then charged or thereafter to be charged, according to the assessment of the land in its *then* state, and not according to its assessment in some future and greatly improved state. There are authorities for this mode of construction. In *Yaw v. Leman* (b), it was held, that a landlord who covenants to pay the land tax, and save the tenant harmless, will discharge his covenant if he pay the tax according to the rent he receives, although the premises may be taxed at a higher rate. The act of granting a licence to build upon the land cannot operate to bind the landlord to the payment of rates beyond the value of the premises at the time when such licence was granted. The case of *Hyde v. Hill* (c) is decisive of the present in favour of the defendant; for it was there held, that under a covenant in a building lease by the tenant to pay all the taxes, except the land tax, the landlord was liable to pay the old land tax only, and not the additional land tax occasioned by the improvement of the estate. It is said, that case does not apply, because

(a) 16 East, 29.

(b) 1 Wils. 21, 2 Stra. 1191,
 S. C. And see *Watson v. Atkins*,

3 Barn. & Ald. 647; *Whitfield v. Broadwood*, 2 Stark. N. P. C. 440.
 (c) 3 T. R. 377.

there was no *express* covenant there by the landlord to pay, as there is here; but the distinction between the two cases is merely imaginary: for the exception 'out of the tenant's covenant threw the liability for the excepted tax upon the landlord, as much as an express covenant to pay that tax could have done, and was in real substance and effect, a covenant by the landlord to pay the land tax.

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BAYLEY, J.—It has been truly stated on both sides that this case presents a mere question of construction of a particular covenant in a lease. That covenant is by the lessor, and is, that he shall pay all taxes, &c., *already charged, or to be charged*, upon or in respect of the land demised, during the continuance of the term granted by the lease. The covenant refers to the lease, and the lease contains a reservation of an annual rent of 79*l.* 12*s.* 6*d.*, and a stipulation that the lessee shall not build upon the land, without the written licence of the lessor so to do. The lessee, therefore, admits by the lease, that the land, in its then state at the period of the demise, without any building whatever upon it, is worth the annual rent of 79*l.* 12*s.* 6*d.*; and the one party agrees to pay, and the other to receive, that particular amount of rent. Taxes might immediately have been imposed according to that amount, taking that as the value of the land; and then the question would have been, whether when the value of the land was increased, the landlord should pay taxes in proportion to the amount actually paid to the parish, or in proportion to the amount of taxes calculated according to the increased value of the land. The covenant is to pay all taxes then charged, or to be charged. At the time when the lease was executed, taxes were imposable only in proportion to the then value of the land, namely, 79*l.* 12*s.* 6*d.* per annum. Great improvements are afterwards made in the land, by the erection of buildings upon it; and then, as it seems to me, the lessee was entitled to claim from the lessor, not the entire

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amount of taxes, calculated upon the entire improved value of the premises, but the amount of taxes calculated according to their value at the date of the demise, namely, the 79*l.* 12*s.* 6*d.* rent. It appears to me, that all the cases bearing upon this subject have proceeded upon that principle; namely, that a landlord who covenants to pay taxes, is to pay them in proportion to the rent he receives, and no more; and that if the taxes are increased, by improvements upon the premises which enhance their value, the tenant is to pay such increase. If that is the correct rule, the landlord in this case is liable for the taxes calculated upon the original rent and value of the land, 79*l.* 12*s.* 6*d.*, and no more; and the damages must be increased in that proportion, whatever that proportion may be.

HOLBOYD, J., and LITLEDAL, J., concurred.

Judgment for the Plaintiff.

It was afterwards agreed by the counsel for both parties, that the damages should be increased from 5*l.* 1*s.* 6*d.* to 30*l.*, the latter sum being as nearly as possible the amount resulting from a calculation of the taxes in the proportion suggested by the Court.

SOLARTE and others, assignees of ALZEDO, a Bankrupt,
 v. MELVILLE and another.

Where,
 upon a de-
 fence of usury,
 the Judge
 states it to be
 his opinion
 that no usury
 has been com-
 mitted, but

leaves it to the jury to draw their own conclusion from the whole matter, and they find against the usury, the Court will not disturb the verdict.

7 Nov 430
 THIS was an action of assumpsit upon six bills of exchange, drawn by *Maltby* and Co., to their own order, upon and accepted by the defendants, and by *Maltby* and Co. indorsed to *Alzedo* before his bankruptcy. At the trial before Lord *Tenterden*, C. J., at the Sittings in

London after last Hilary term (*a*), it appeared that in November, 1822, *Bramley*, a bill broker, had applied to *Alzedo*, to discount for him the bills of *Wagstaffe*, whom he represented to be perfectly safe. This was acceded to, and *Wagstaffe's* bills were discounted by *Alzedo* to a large amount. The bills were not indorsed by *Bramley*, but his course was to give the bankrupt a written collateral guarantee. Besides the bills discounted through *Bramley*, *Alzedo*, on the application of *Wagstaffe*, discounted other bills for *Wagstaffe*, without the intervention or knowledge of *Bramley*. In January, 1823, *Wagstaffe* failed; *Alzedo* then being a holder of his bills to the amount of 4511*l.* 15*s.* 6*d.*, discounted through *Bramley*, and of 9392*l.* 9*s.* 4*d.*, upon bills received immediately from *Wagstaffe*. On the 28th January, *Bramley* applied to *Alzedo* for indulgence in respect of his liability; and 1st July, 1823, wrote to him as follows, "I wish to know if it will be convenient to you if I should bring you some bills of which there could not exist a doubt of perfect solidity, if you would like to discount them at five per cent, and deduct at the rate of ten per cent from such bills against the bills unpaid in your hands. If it was agreeable a short time would convince you that you could sustain no loss on any taken from me. I would offer you some particularly drawn by Messrs. *Maltby* and Co., &c." This proposal was acceded to by *Alzedo*. *Bramley* was employed by *Maltby* and Co. to discount bills with *Alzedo*, but they were ignorant of the terms upon which he dealt with *Alzedo*, as they were charged by *Bramley* merely with discount and commission, his mode of dealing with them being, occasionally to settle bills *to a point*, that is, to hand over to them specifically the amount of each bill discounted, and occasionally to advance money on account of the bills

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(*a*) Counsel for the plaintiffs, for the defendants, *Tindal*, S. G., *Scarlett*, F. Pollock, and *Brougham*; *Gurney*, and *Platt*.

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discounted. *Bramley* had generally in his hands a mass of their bills and of the bills of other persons, and was generally indebted to *Maltby* and Co. to a large amount on the balance of accounts, and had a running account with them. On the 24th October, 1823, *Bramley* wrote to *Alzedo*, "Allow me to say I have been equally deceived with yourself as regarded *Wagstaffe*, but I can assure you, if from any representations of mine, you have been induced to give him credit, I will, if my life is preserved, see justice done by you. As far as my own engagements exist with you, I am going on, I trust, in that straight forward path to liquidate them. It will be a work of time, but I will accomplish it, provided (a) you do not withdraw yourself from me." On the 12th November, 1824, *Bramley* wrote to *Alzedo*—"The continued confidence you place in me will be a stimulus to every exertion on my part, to see that not one shilling is left unpaid; and let me conjure you to divest your mind of all prejudice against me, because I had unfortunately to do with a rogue as well as yourself; and further rest assured, I shall not feel happy till I have not only paid you any loss by bills taken from me, but also for any you may have taken in consequence of representations made by me, which, at the same time, I wish you to believe, I did most innocently. Give me only your support (a), and you will never have occasion to repent it." On the 17th November, 1824, *Bramley* wrote—"I am resolved that every shilling due to you, both legal and honorary (b), I mean honorary (a), because if you took bills from *Wagstaffe* upon any assurance of mine, I am bound to see you protected, and will do so; I only require time and your support (a), and will prove to you I am an honest man."

At this period the discount accounts between *Alzedo* and *Bramley* were in the following form :

(a) *Post*, 202 (a).

(b) The words "shall be paid," appear to be here omitted.

"£456 7 0 *Maltby & Co.*, due 5th Oct. 94 days, £5 17 5
 5 17 5

450 9 7

45 0 0 to be passed to account (a).

£405 9 7"

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Upon this footing the parties proceeded until 31st December, 1824, when, upon *Bramley's* making out an account of the sums retained by *Alzedo*, on account of *Bramley's* guarantee on the bills of *Wagstaffe*, discounted through him, they were found to amount to 5621*l.* 2*s.* 6*d.*, being upwards of 1200*l.* more than sufficient to discharge such guarantee. *Bramley's* own debt being now discharged, he proposed to *Alzedo*, that if *Alzedo* would continue his discounts, he should retain one per cent. upon each transaction (b) towards satisfaction of the debt remaining due from *Wagstaffe* in respect of bills discounted by *Alzedo*, without the intervention of *Bramley*.

(a) No question arose as to the legality of this transaction, as the six bills were not drawn till after the ten per cent. arrangement had ceased to be in operation. The form of the guarantee given was, "I hereby guarantee to you the regular payment of the enclosed twenty bills; and, in case of need, will duly provide for the same. H. Bramley, London, 8th Oct. 1825." No consideration appears upon the face of this guarantee, (4 B. & A. 595), nor can any be necessarily inferred, (*Ib.* 597). If the bills declared on had been discounted whilst the ten per cent. was deducted, a question might have been raised, whether, upon the discounting of bills, it is usury to retain a sum which the broker is under a legal or a moral obligation to pay to the discounteer.

If such retainer is authorized by the principal, the contract is in substance this: in consideration, A. will lend money, at five per cent., to B. B. agrees to pay to A., or to permit him to deduct out of the nominal amount of the loan, a sum legally or morally due from C. to A. On the other hand, if the deduction is not authorized by the principal, it seems to be either a mere tortious withholding of part of the principal's money, (*post* 205) or the acceptance of a collateral consideration for the loan, from the broker. See *White v. Wright*, 5 D. & R. 110, 3 B. & C. 273.

(b) Supposing the bills discounted to have 94 days to run, as in the above statement, this would amount to a bonus of nearly four per cent. per annum.

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This proposal was accepted, and was acted upon at the period when the bills declared on were drawn by *Maltby* and Co., accepted by the defendants, and discounted by *Alzedo*; but the one per cent. was not charged by *Bramley* to *Maltby* and Co., his employers, who had credit in account with *Bramley* for the full amount, deducting the discount, though, by reason of *Maltby* and Co.'s being throughout largely in advance to *Bramley*, the loss fell ultimately on their estate. *Bramley*, who was examined as a witness on the part of the plaintiffs, stated, that he thought himself bound in honour (a) to pay the bills which *Alzedo* had discounted for *Wagstaffe*, without the

(a) The nature of this honorary obligation may perhaps be collected from the following examination of *Bramley*, under *Alzedo's* commission :

" Q. You have stated that you considered yourself bound in honour to pay the bills which *Alzedo* discounted for *Wagstaffe*. On what particular ground did you so consider ?

" A. If I was deriving great advantages from a man, which I certainly was at that moment, and from hearing from him, he was induced to discount bills from *Wagstaffe*, either from my representations, or from seeing similar bills discounted for myself; that certainly was an inducement for me to see him paid—his engagement to discount.

" Q. Then do you mean, that if he discounted bills for you, you were, for that reason, bound in honour to see *Wagstaffe's* bills liquidated ?

" A. I do." (*vide ante* 200 (a)).

The loose manner in which the term honorary obligation has been used, seems to have given rise to

an opinion, that a witness, who considers himself bound in honour to indemnify one of the parties, is not thereby disqualified from being called as a witness by that party; as it is said that the same sense of honour which requires the witness to perform his engagement to indemnify, will induce him to speak the truth. The word honour appears to be here employed in two senses. The honour which compels the witness to indemnify, is a sense of moral obligation, coupled with the desire of standing well with the party and with the world, upon whose good opinion the most important interests may depend, or it may be the latter consideration only; whereas, the honour which is to compel the witness to speak the truth, although against the interest of the party whom he comes to support, and whom he even stands engaged to indemnify, is the sense of moral obligation only.

And see *Fotherington v. Greenwood*, 1 Stra. 121; *Anon.*, cited in *Rudd's case*, 1 Leach, Cro. Ca. 154; *Res v. Inhabitants of Woburn*, 10 East, 395.

intervention of *Bramley*, but in consequence of the high character which *Bramley*, at the time believing it to be true, had given of *Wagstaffe*, and that, if he had possessed the means, he would have paid *Alzedo* the whole amount at once. *Alzedo* sometimes discounted bills for *Bramley*, at less than 5*l.* per cent., but the latter always charged his employers 5*l.* per cent. and brokerage. He had always in his hands a large mass of bills, belonging to *Maltby* and Co. and other persons, out of which he supplied, from time to time, what money *Maltby* and Co. required. Upon this evidence, it was objected on the part of the defendant, that the bills in question were void by the statute of usury (a), under which, if excessive interest or discount be taken, accepted, or received by the party discounting, it is not necessary that it should be received from the party for whose benefit the bill is discounted.

The learned Judge, in his address to the jury, said, "the defence is, that the bankrupt who received these

(a) 12 Ann. stat. 2, c. 16, which provides, "that no person or persons whatsoever, from and after 29th Sept., 1714, upon any contract which shall be made from and after the 29th Sept., take directly or indirectly, for loan of any moneys, wares, merchandizes, or other commodities whatsoever, above the value of 5*l.* for the forbearance of 100*l.* for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time, and that all bonds, contracts, and assurances whatsoever made after the time aforesaid, for payment of any principal or money to be lent, or covenanted to be performed, (*sic*), upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of 5*l.* in the 100*l.* as aforesaid, shall be utterly void. And that all and every person or persons

whatsoever, which shall after the time aforesaid, upon any contract to be made after the said 29th Sept., take, accept, and receive by way or means of any corrupt bargain, loan, exchange, chevizance, shift or interest, of any wares, merchandize, or other thing or things whatsoever, or by any deceitful way or means, or by any covin, engine, or deceitful conveyance, for the forbearing or giving day of payment for one whole year, of and for their money, or other thing, above the sum of 5*l.* for the forbearing of 100*l.* for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter term, shall forfeit and lose for every such offence the treble value of the moneys, wares, merchandizes and other things so lent, bargained, exchanged, or shifted," sect. 1.

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bills in discount, discounted them upon an usurious bargain, to receive more than 5*l.* per cent., in respect of the discount, at the price of the discount, and for the forbearance of the money advanced, until those bills should become due;—that is the defence. Now if a person does corruptly bargain to receive more than 5*l.* per cent., if that be the substance of the contract between the parties, whatever form or colour they may think fit to give it, the law will act upon the substance of the transaction, regardless of the form and colour; but still it remains a question in each case, what is the real substance of the transaction (a). *Bramley* had made a representation to the bankrupt as to the character of *Wagstaffe*, before the bankrupt discounted any bills for *Wagstaffe*. Several of *Wagstaffe's* bills had been guaranteed by *Bramley*, who was liable on his guarantee to a large amount. In respect of the other bills discounted by the bankrupt for *Wagstaffe*, *Bramley* considered himself under an honorary, not a legal obligation; and one per cent. is deducted to pay the bankrupt's loss. If there was nothing but the fact that 1*l.* per cent. was deducted in addition to 5*l.* per cent., it would be undoubtedly usury; but there was something more, namely, that *Bramley* conceived himself under an honorary obligation. If *Bramley* thought himself under an honorary obligation to pay, as far as my opinion goes, I should be inclined to say the transaction was not usurious."

The jury found a verdict for the plaintiffs.

In last Easter term, *Tindal*, S. G., obtained a rule to shew cause why the verdict should not be set aside, and a new trial had on the ground of misdirection, and that the verdict was against evidence; against which rule—

Scarlett, A. G., *Brougham*, and *F. Pollock*, now shewed cause. It is not usury to deduct an old debt out of the amount of bills discounted. The business of a broker is a new trade sprung up within the last 50 years. They keep

(a) *Ante*, 155.

debtor and creditor accounts with their customers, and instead of indorsing the bill which is to pass through their hands, their practice is to give a written guarantee (a); and whenever a broker brings a bill with a new name upon it, he makes a representation as to the solvency of such party. Here the broker, if he had been solvent, would have paid the full amount himself. Now the circumstance of the broker's being solvent or insolvent cannot make a contract corrupt. The broker was indebted to his employers in the full amount of the bills, and if he told the discounter that he might detain his, the broker's, own debt out of the amount, it might be a fraud upon his employer; but the contract not being originally usurious would not become so by this fraud. In *Buckley v. Guilbank* (b), a special verdict in ejectment finding that all parties were present at the making of an agreement for excessive interest, was not considered conclusive as to the alleged usury. In *Carstairs v. Stein* (c), it was held that the question, whether a particular transaction was a colour for usury, was for the consideration of the jury. There the Court refused to disturb the verdict, though it was against the opinion of the Judge who tried the cause. Here the verdict accorded with the Judge's opinion.

Tindal, S. G., and Gurney, contra. This case was not presented fairly and fully to the consideration of the jury. The learned Judge concluded his address to them by saying, that if nothing but the one per cent. had appeared, the transaction would have been usurious; but that if the broker thought himself bound in honour, he should think it not usury. The case went to the jury with the prejudice of that opinion. At the end of every week an account was settled between the broker and the bankrupt and was produced, in which one per cent. was charged beyond

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(a) As to the force of these guarantees *vide supra* 201 (a).

(b) Cro. Jac. 677. There it was expressly found that the appearance of usury in the convey-

ance to the lessor of the plaintiff, was created by the insertion of a false date *by the mistake of the scrivener; et vide ante*, 136.

(c) 4 M. & S. 192.

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the five per cent. The plaintiff's counsel would represent that usury cannot be committed by a bill-broker at all. It is insisted, that if a bill-broker offer a bonus to the discounteer, it is not usury unless the money come out of the pocket of the employer. No doubt, a debtor discounting a bill may pay part of it to his discounting creditor. This would be an idle ceremony, and therefore the amount may be deducted at once. But if *honour* be a sufficient ground for making a deduction beyond five per cent., why may it not be also done on the score of *liberality*? If it were necessary to consider whether any honorary engagement existed, it might safely be said that none did exist. The bankrupt had begun discounting directly with *Wagstaffe*, to save the brokerage either to himself or to *Wagstaffe*. The legislature, in speaking of a "corrupt" agreement, uses the term "corrupt" in a legal, not in a moral sense. In *Marsh v. Martindale* (a), Lord *Alvanley* said, that if a man agree to take more than five per cent. for the forbearance of money, the law declares that such an agreement is corrupt within the statute of *Anne*, whether the parties thought at the time they were acting contrary to the statute or not. The agent of the owner of a bill might according to the doctrine now contended for, take it into the market and pay six or eight per cent. The bankrupt knew he had no legal claim for the one per cent., and must have been aware that he was receiving it as a bonus. The mere supposition of liability would not justify the payment (a). But the contract was in substance this: "If you will go on discounting, I will allow you one per cent. upon *Wagstaffe's* debt."

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court.—

This was an action on bills of exchange, and the question was, whether these bills were tainted with usury. They had been discounted through the intervention of a

(a) 3 B. & P. 154.

broker of the name of *Bramley*, who had represented to the bankrupt that, in consequence of his having recommended *Wagstaffe* to the bankrupt, and as he could not pay the whole amount at once, the bankrupt should go on discounting, and that he, *Bramley*, should deduct one per cent. from the sums to be paid by the bankrupt, but would charge his employers, as if he had made no such deduction. I left it to the jury, whether *Bramley* thought himself under an honorary engagement to pay the bankrupt; and that if he did, it was not usury. A new trial was moved for, on the ground that I ought to have intimated my opinion to the jury, and that I ought to have done so in a different way. I still think, and I believe one or two of my learned brothers are of the same opinion, that if *Bramley* thought himself under an honorary obligation, what was done was not usury. We all, however, think that, as, notwithstanding my intimating such an opinion, I left it to the jury to draw their own conclusion upon the whole matter, we cannot disturb the verdict, in a case involving such penal consequences.

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Rule discharged (a).

(a) The statute of *Anne* (*ante*, 203, n.), like the previous statutes of 37 *Hen.* 8, c. 9, 21 *Jac.* 1, c. 17, 12 *Car.* 2, c. 13, which limit the rate of interest successively at 10, 8, and 6 per cent., does not proceed upon any distinction between profit and indemnity (*ante*, 136, n.), but fixes a maximum for the price of the use of money, which it enforces by declaring the contracts and assurances void, (*ante*, 203, n.), and by subjecting the lender to a penalty equal to three times the amount of the principal lent or forborne, where more than 5 per cent. is taken, (12 *Ann.* stat. 2, c. 16, sect. 1).

The statute of 37 *Hen.* 8, c. 9, the first creating a maximum is the first which enacts the treble forfeiture. That act having been repealed by 5 & 6 *Edw.* 6, c. 20, which forbade *all* usury, was re-enacted by 13 *Elis.* c. 8, which superadds (sect. 5), the forfeiture of the simple amount of the interest where *less* than 10 per cent. is taken.


Maximums of price abound in the statute book; but, except the statute of *Anne*, they are all now repealed or, as the provision in 13 *Elis.*, c. 8, s. 5, become obsolete.

DOE on the demise of WATERS, clerk, against HOUGHTON.

Upon a demise "until Michaelmas next and no longer" with the privilege of using part of the premises for specific purposes till Lady-day following, ejectment may be brought for those parts to which the privilege does not extend, in the interval between Michaelmas and Lady-day. Such an agreement containing an express provision for giving up the farm at Michaelmas, the lessor with the assent of the lessee, adds the words "house and buildings."—*Seemle*, that this alteration, being merely an expression of what was before implied, does not require a new stamp.

EJECTMENT for a messuage and lands at Rippingale, in the county of Lincoln. The lessor of the plaintiff was in November, 1825, instituted and inducted into the rectory of Rippingale. The premises in question had been annexed to the rectory of Rippingale by an inclosure act. The former rector, whose incumbency ended by resignation in October, 1825, had demised the premises to the defendant, who continued in possession until 23d January, 1826, when the following written agreement was entered into :—"Memorandum of an agreement between Rev. Mr. *Waters*, rector of Rippingale, and Mr. *William Houghton*, of, &c., who agree as follows, viz., Mr. *Houghton* to occupy the whole of the glebe lands, which he now occupies, belonging to the rectory of Rippingale aforesaid, until Michaelmas next, O. S. and no longer, at the rent of 700*l.*, payable, half at Lady-day next, and half at the expiration of the term agreed upon; with the following privileges to Mr. *Houghton*, viz., to plough up the Corner close (now grass) adjoining the cross roads, and the lower part of the House close in a line even with Mr. *J. Shield's* close, and to sow the same with beans, and to plough and sow the Bottom fen close, excepting about twenty acres, where the seeds appear to be the best; also to plough and sow with a crop of beans, the wheat stubble close which runs up to Graby hedge; also to be allowed by the in-coming tenant for the new yard fencing. Mr. *Houghton* also to have the use of the barns and farm-yard, to thrash and cut or consume the straw in, until Lady-day, 1827, if he can possibly clear it up by that time, and if not, until May-day, 1827. Mr. *Houghton* on his part agrees to leave all the house, barn, stables, and other buildings, now upon the premises, as well as all the straw and manure that has grown and arisen, or is to

grow and arise, from the said farm previously to Lady-day, 1827, at which time and period Mr. *Houghton* agrees to give up the holding and occupation, and possession, of the said farm *. Mr. *Houghton* is also to have the privilege of eating the turnips, if any are growing on the land, until new Lady-day, 1827. Agreed upon and signed this 23d day of January, 1826, by us, *W. Waters, William Houghton*." Shortly after this memorandum had been signed, the lessor of the plaintiff altered the clause, "at which time and period Mr. *Houghton* agrees to give up the holding and occupation, and possession of the said farm," by adding at the asterisk * the words "house and premises," and informed the defendant he had done so, and requested to have defendant's copy of the agreement, to make a similar addition. The defendant promised to call, and alter his copy of the agreement accordingly, but this was never done. The demise in the declaration was laid on the 16th October, 1826. On the 8th of November, 1826, a distress was taken by the lessor of the plaintiff for 350*l.*, for rent due 10th October, 1826, which rent was afterwards paid by the defendant. No notice to quit had been given. At the trial before *Abbott*, C. J., at the last Spring assizes for the county of Lincoln (a), it was objected on the part of the defendant, that the agreement having been altered in a material part was not admissible in evidence, and that the tenancy evidenced by the distress, must be taken to be a tenancy from year to year, entitling the defendant to notice to quit; and that by the agreement itself, the defendant was entitled to hold till Lady-day. The learned Judge over-ruled the objection, and received the evidence, being of opinion, that by the agreement, the whole tenancy was to determine at Michaelmas, but that the tenant was to have certain privileges which would extend beyond that period; that the agreement might, perhaps, be vitiated, but then there

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(a) Counsel for the plaintiff, *Dowell*; for the defendant, *Clarke*, *Denman*, C. S., *Balguy*, and *Mac Reader*.

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was no tenancy (*a*). A verdict was found for the plaintiff, with leave for the defendant to move to enter a nonsuit.

Clarke having moved accordingly, in Easter term last, obtained a rule to shew cause why a nonsuit should not be entered. Against which,

Denman, C. S., and *Balguy*, now shewed cause. The alteration was made with the defendant's consent. It was in an immaterial part; and it was at all events admissible to shew the terms of the tenancy. The agreement contained express stipulations to quit at Michaelmas, 1826; though the tenant was to have certain *privileges* until Lady-day, 1827. As the agreement originally stood, the farm was to be given up at Lady-day. By this must have been meant what was afterwards expressed by the alteration; for if, as the defendant contends, he was entitled to hold the land up to Lady-day, it would have been wholly unnecessary to reserve to him a power of eating and consuming the turnips, &c., until Lady-day. But supposing the alteration to be material, it was acceded to by the defendant; and they cited *Cole v. Parkin* (*b*), and *Paton v. Winter* (*c*).

Clarke and *Reader*, *contra*.—It is clear that the relation of landlord and tenant existed between these parties. That is shewn by the distress (*d*). Before the agreement was read, the defendant's counsel asked if it was the same agreement which had been originally signed by the parties. The witness said it was not; it having been altered by the plaintiff. The learned Judge, nevertheless,

(*a*) The distress, though taken after old Michaelmas, yet being for rent which had accrued before that time, would not be an affirmance of a tenancy subsisting at the period of the distress; a landlord being authorized by 4 Ann., cap. 16, to distrain within


six months after the determination of the tenancy, provided the title of the landlord and the occupation of the tenant continue.

(*b*) 10 East, 471.

(*c*) 1 Taunt. 420.

(*d*) *Sed vide supra*, note (*a*) *contra*.

said that he should receive it in evidence. It was altered no doubt to cure an objection to the lessor of the plaintiff's right of resuming the possession. If the alteration gives the party a right to enter earlier, it is material.

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LORD TENTERDEN, C. J.—If the verdict was given for the glebe land it must stand. Upon the ground of assent to the alteration, this rule ought to be discharged (*a*). They will take out execution at their peril.

BAYLEY, J.—The Court of Common Pleas have held, that where a policy has been altered, it is binding in its altered shape upon those parties who have assented to the alteration, and that it binds those who have not so assented, in the shape in which it stood originally. There the alteration was made, not by consent, but for the purpose of proposing it to the underwriters. If it had stood "farm," it would have included the house and buildings (*b*).

HOLROYD, J., and LITLEDALE, J., concurred.

Rule discharged (*c*).

(*a*) *Vide* *Sutton v. Toomer*, ante, 125.

(*b*) *Expressio eorum, quæ tacitè insunt, nihil operatur*. For instances of the application of this maxim,—see 2 Co. Inst. 365; *Idle v. Cook*, 1 Peere Wms, 79, 80; *Elliott v.*

Davenport, ib. 84; *Blackborne v. Edgeley*, ib. 606. And see *Clapham v. Cologan*, 3 Campb. 382.

(*c*) And see *French v. Patten*, 9 East, 351; *Fairlie v. Christie*, 7 Taunt. 416, 1 J. B. Moore, 114, Holt, N. P. C. 331, S. C.

BRIDGETT v. COYNEY, Esq.

TRESPASS, against a magistrate, for an assault and false imprisonment. At the trial, before *Littledale, J.*, at Plaintiff appeared before defendant, a magistrate, to answer the complaint of *A.*, for unlawfully killing his dog. Defendant advised plaintiff to settle the matter, by paying a sum of money, which plaintiff declined. Defendant then said, "he would convict plaintiff in a penalty under the Trespass Act, in which case he would go to prison." Plaintiff still declined paying, and said he would appeal. De-

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the last assizes for the county of Stafford (*a*), the case was this:—On the 19th January, 1827, the plaintiff appeared before the defendant, an acting magistrate for the county of Stafford, to answer a charge made against him by one *Dawson*, for wilfully and maliciously shooting his dog. The defendant having heard the complaint, inquired of *Dawson* what he claimed as the value of his dog; to which the latter replied, that he would not take less than 5*l*. The defendant proposed to the plaintiff to pay, and to *Dawson* to accept, 3*l*., as a compensation for the loss of the dog; and upon the plaintiff's refusing to pay that sum, told the latter that he should convict him in that sum, under the Malicious Trespass Act, in which case he would be committed to prison; but at the same time again recommended the parties to settle the matter. The plaintiff replied that he would not pay, and that he would "carry the case elsewhere;" upon which the defendant called in a constable, and said to him, pointing to the plaintiff, "take this man out, and see whether they can agree to settle the matter, and if not, bring him in again, as I must proceed to convict him under the act." The constable, the plaintiff, and *Dawson*, thereupon left the room together, and the plaintiff having shortly afterwards paid 3*l*. for the dog, and some shillings for fees, was allowed to depart. No evidence was offered on the part of the defendant, but it was contended, that the action could not be maintained, inasmuch as no imprisonment had been proved; for that the mere fact of the defendant having called in a constable, and given him the directions he did, and of the plaintiff having left the room in com-

(*a*) Counsel for the plaintiff, for the defendant, *Russell*, Serjt., *Taunton*, *Campbell*, and *Richards*; and *Wheatley*.

defendant then called in a constable, and said, "take this man out, and see if they can settle the matter; and if not, bring him in again, as I must proceed to commit him under the act." Plaintiff then went out with the constable, and settled the matter, by paying a sum of money:—Held, that this was an assault and false imprisonment, for which trespass would lie; and which, as no conviction had been drawn up, defendant could not justify.

pany with the constable, did not constitute a taking into custody of the plaintiff, so as to support the allegation of his having been assaulted and imprisoned. The learned Judge told the jury that, in his opinion, there was a sufficient apprehension and restraint of the plaintiff's person to constitute an assault and imprisonment in law, and that the circumstances of the case did not furnish any justification to the defendant for having authorized that assault and imprisonment; and the jury, under that direction, found a verdict for the plaintiff.

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Russell, Serjt., now moved for a new trial, upon the ground that the learned Judge had mis-directed the jury, in point of law. There was no assault or imprisonment proved, therefore the action was not maintainable; and in that respect the direction of the learned Judge was wrong. There was nothing to shew that the constable said or did any thing indicative of an intention to take the plaintiff into custody: he neither charged him, as his prisoner, to go with him, nor laid so much as a finger upon his person: for all that appeared, the plaintiff accompanied the constable voluntarily, as *Dawson* did, merely as a referee or mediator, and not under any notion of compulsion or duress. [Lord Tenterden, C. J. But the defendant ordered the constable to take the plaintiff out, and, if the business was not settled, to bring him in again, as he must proceed to commit him. What jurisdiction had he to interfere at all in such a case?] He had clearly jurisdiction under the Malicious Trespass Act (a). By that act the defendant had authority to convict the plaintiff of wilfully and maliciously killing the dog; and he did in effect convict him of that offence: and if so, the imprisonment of the plaintiff, even if proved, was justified, and in that respect the direction of the learned Judge was wrong. Again, if the plaintiff was not convicted, still the defendant had authority to detain him for the purpose of

(a) 1 Geo. 4, c. 56.

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conviction ; as he would have had to issue his warrant for his apprehension, if he had not appeared to answer the charge. This is clear upon all the authorities. In *Hawkins'* P. C. (a), it is said, " wherever a statute gives to any one justice of the peace a jurisdiction over any offence, or a power to require any person to do a certain thing ordained by such statute, it impliedly gives a power to every such justice to make out a warrant to bring before him any person accused of such offence, or compellable to do the thing ordained by such statute." So, in *Bane v. Methuen* (b), a very recent case, it was decided, that if an act of parliament gave a justice of the peace jurisdiction over an offence, it impliedly empowers him to make out a warrant, and bring before him any person charged with such offence. Where, therefore, a party neglected to attend a summons granted by a magistrate, charged with an offence under the Malicious Trespass Act, 1 Geo. 4, c. 56, it was held, that he might issue his warrant to apprehend and bring such party before him, to answer the charge, although it was insisted that he had no power to do so until after conviction (c). The strong argument in the present case, however, is, that the plaintiff was convicted ; and it was not necessary for the defendant, in support of that position, to produce the conviction, drawn up, at the trial, for a conviction may be complete in operation of law, before the formal instrument, setting it out, is drawn up, *Still v. Walls* (d), which, indeed, it is allowed, may be drawn up at any time, before the return to a *certiorari* or the sessions, though after a commitment, *Massey v. Johnson* (e), or after the penalty has been levied by distress ; *Rex v. Barker*, (f).

Lord TENTERDEN, C. J.—I do not see any ground for

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| (a) Book ii., c. 13, s. 15. | (d) 7 East, 533. |
| (b) 9 J. B. Moore, 161, 2 Bingh. | (e) 12 East, 32. |
| 63, 3 D. & R., M. C. 533, S. C. | (f) 1 East, 82 ; Paley on Convictions, 2d edit., by Dowling, 55. |
| (c) And see 12 Co. Rep. 131. | |

disturbing the verdict in this case. The direction of the learned Judge to the jury was, in my opinion, perfectly correct. I think there was abundant evidence of an imprisonment of the plaintiff, by the order of the defendant, and there is nothing in the circumstances of the case, which, in my judgment, furnishes a justification of that imprisonment. What are the circumstances of the case? The plaintiff appears before the defendant, who is a magistrate, to answer the complaint of *Dawson*, of having unlawfully killed his dog. The defendant proposes to the parties to arrange the matter upon amicable terms. The plaintiff rejects that proposal, upon which the defendant tells him, that unless he pays a certain sum of money, he shall convict him in a penalty of that amount, under an act of parliament, in which case he will be committed to prison. The plaintiff still rejects the proposal, and declares that he will carry the case elsewhere; that is, that he will appeal from the defendant's jurisdiction to a higher tribunal. Upon that the defendant calls in a constable, whom he orders to take the plaintiff out, and if the parties cannot settle the matter, to bring him in again, as he must proceed to commit him under the act. The plaintiff accordingly goes out with the constable(a), and while they

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(a) "If the constable, in consequence of the defendant's charge, had for one moment taken possession of the plaintiff's person, it would be, in point of law, an imprisonment; as, for example, if he had 'tapped her on the shoulder, and said, "You are my prisoner," or if she had submitted herself into his custody, such would be an imprisonment; but the merely giving her in charge, without any taking possession of the person, where nothing more passes than merely the charge, is not, by law, a false imprisonment." Per *Eyre*, C. J., in *Simpson v. Hill*, 1 Esp.

N. P. C. 431; and see *Pocock v. Moore*, 1 R. & M. 321. In *Arrow-smith v. Le Mesurier*, 2 N. R. 211, the case was this: a warrant, having been granted by a magistrate, for apprehending the plaintiff upon a charge of conspiracy to sue out a fraudulent commission of bankrupt, a constable went to the plaintiff's house, and shewed him the warrant. The plaintiff desired to have a copy of the warrant, which the constable permitted him to take; after which the plaintiff attended the constable to the magistrate, and, after being examined upon the subject of the charge, was

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are absent the affair is settled, by the plaintiff's paying a sum of money. It seems to me impossible to doubt that the plaintiff went out on that occasion in custody, having been ordered into that custody by the defendant; and if so, there is, in the eye of the law, an assault and false imprisonment by the defendant upon the person of the plaintiff. Then what is the justification? It is said that the plaintiff was convicted, and therefore that his detention was legal. What evidence is there of his conviction? No conviction was produced at the trial, or is laid before us now; indeed, it is admitted, that none has ever been drawn up: then how can we possibly say that the party was convicted (a)? The final arrangement of the matter by the parties, in an amicable way, might properly prevent the defendant from acting upon the conviction, if there had been one; but it did not prevent his drawing it up as a justification of his own conduct in the transaction; and not having done so, he is without justification, and must abide the consequences.

The other Judges concurred.

Rule refused.

dismissed. A verdict having been found for the defendant, the Court refused to grant a rule for a new trial, saying, that "an arrest may take place without an actual touch, as if a man be locked up in a room; but here the plaintiff went voluntarily before the magistrate. The warrant was made no other use of than a summons. The constable brought a warrant, but did not arrest the plaintiff. How can a man's walking freely to a magistrate prove him to be arrested?" So in Dalton's Justice, cap. 170, (p. 466, ed. 1677), it is said, "If the constable, or other officer, upon a warrant received from a

justice of the peace, shall come unto the party, and require, or charge or command him to go before the justice, &c., this is no arrest or imprisonment." In *Gerner v. Sparkes*, 1 Salk. 79, the marginal note, which has been transcribed by subsequent text writers, is, that "no arrest can be without actually touching the defendant;" but in that case the defendant never *submitted* to the officer, but kept him off with a fork. And see *Breton v. Burridge*, 3 Campb. 139.

(a) See *Rodgers v. Jones*, 5 D. & R. 268, 3 B. & C. 409, 1 R. & M. 129, S. C.; *Brq. Trespass*, 177.

THE KING v. ROBERT KNIGHT, Esq. and others.

7 B.C. 413.
INDICTMENT for obstructing a highway, stated, that defendants, on the 27th December, in the seventh year of the reign, &c., with force and arms, unlawfully and injuriously did dig, stock up, and remove, and caused to be dug, stocked up, and removed, the gravel, soil, and rubbish, then being upon and over a certain brick culvert, for the convenience of his Majesty's liege subjects passing there along, *in the parish of Studley, in the county of Warwick*, opposite to a certain mill there, called Studley Mill, *in a certain King's common highway, there leading from Studley, in the said county of Warwick, to Henley in Arden, in the said county, &c.* Plea, not guilty. At the trial before Lord Tenterden, C. J., at the last Warwickshire assizes, the defendants were found guilty.

Indictment for obstructing a highway, charging, "that defendant removed a culvert in the parish of S., opposite to a mill there, in a highway there, leading from S. to H." Held good, on motion in arrest of judgment.

Denman, C. S., now moved for a rule to shew cause why the judgment should not be arrested, upon the ground that the description, in the indictment, of the road alleged to have been obstructed, was repugnant and bad. The allegation is, that the defendants removed a culvert in the parish of Studley, in the county of Warwick, opposite a mill in a highway there, leading from Studley to Henley, in the same county; which is certainly not a direct allegation that the highway in question is in the parish of Studley, and county of Warwick, nor even is that inference necessarily deducible from it. The only positive description of the highway is, that it leads from Studley to Henley; now, *from* and *to* are both words of exclusion, *Rex v. Gamlingay (a)*. The result, therefore, is, that the highway is in neither of the parishes mentioned, but lies between, but out of, both of them. The case cited seems quite decisive of the point, for it was there held, that an indictment against the parish of B., for not repairing a road leading from A. to B. was exclusive of B., and therefore bad. And further, that it was not aided by a subse-

(a) 3 T. R. 513.

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quent allegation that a certain part of the same highway, situate in B., was in decay. The same rule of construction had been previously applied to an act of parliament, in the case of *Hammond v. Brewer* (a). That case arose upon a clause in a turnpike act (b), which gave directions for repairing the road *to* and *from* the town of Battle; the only question was, whether the act was intended to *include* or *exclude* the town of Battle itself: and the Court were clear that the act of parliament was intended to *exclude* the town of Battle. Both those decisions seem to have been founded upon an authority in 2 *Roll. Abr.* (c), where it is said, "if A. is indicted for stopping up a way at D., leading from D. to S., it is not good, because it does not allege the way to be *in* D., but to lead *from* D., which excludes the vill. And in *M. 21 Car. I.*, such an indictment was quashed." Upon these authorities it is submitted that this indictment is bad, and that the judgment upon it ought to be arrested.

Lord TENTERDEN, C. J.—The indictment in *Rex v. Gamlingay* was very different from the indictment in this case. The only description of the road there was, that it was a road leading *from* the parish of A. *to* the parish of B. Here we have much more, because the allegation is, that the defendants committed an obstruction *in* the parish of S., opposite to a mill *there*, *in* a highway *there*, leading *from* S. *to* H. To construe the words "*to*" and "*from*," in that sentence exclusively, would be to render insensible and absurd, that which is otherwise sensible and intelligible: and why should we go out of our way to produce such a result? If the defendants, *in* the parish of S., have obstructed a highway, they are guilty upon this indictment, and I think there is an abundantly plain allegation of their having done so. In common parlance and acceptance, the words "*to*" and "*from*" have, very frequently, an inclusive meaning (d); and I am by no means

(a) 1 Burr. 376.

(b) 26 Geo. 2, c. 54.

(c) Indictment (M) pl. 19.

(d) Cowp. 717, acc.

satisfied with the general rule laid down in *Rex v. Gamlingay*(a), that they ought to be construed exclusively. The case in *Burrow* is also very different from the present. The object of the act there, was to impose a toll. Many of the clauses described the roads as leading from, to, and *through* towns; but the clause in question omitted the word *through*. Lord *Mansfield* observed, that it was neither usual nor convenient to erect toll gates in the middle of great towns, which the commissioners under the act had done: and upon those grounds the decision of that case clearly proceeded. For these reasons, I am of opinion that this indictment may be supported.

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BAYLEY, J.—I am of the same opinion. The objection in *Rex v. Gamlingay* was, that it did not appear from any thing stated in the indictment, that any part of the road was in the indicted parish, because the first allegation that the road led from A. to B., was clearly bad in that respect, and the second allegation, that part of the *same* road, situate in B., was in decay, referred back to the first, and therefore could not aid it; for both plainly alluded to one and the same road. And even there Lord *Kenyon* appears to have yielded to the objection with regret, and rather from the idea that he was bound by the authority in *Rolle's Abridgment* (b), than from his own conviction of the validity of the objection. Here, however, the objection does not apply; for there is in this indictment, a very sufficient allegation that the defendants have obstructed a road *in* the parish of Studley.

The other Judges concurred.

Rule refused.

(a) 3 T. R. 513.

(b) And see *Halsey's* case, Latch, 183. *Halsey* was indicted "*quod apud Kensington cum quodam muro coctili obstupavit altam viam regiam ducentem de London ad Kensington*"; and the indictment was quashed by Jones and Whitlocke, (*absente* Doderidge), because the

stopping is alleged *at* Kensington, but the way is alleged to be from and to K., so there K. is excluded. As a lease for three years, from Michaelmas excludes Michaelmas. At another day, another indictment was reversed for the same cause, by Doderidge and Whitlocke."

## GEORGE BUTCHER v. JOHN BUTCHER.

A remainder man enters upon a party in possession by intrusion (a). Held, that trespass lies against the intruder, although he retain the actual possession.

<sup>740 399</sup>  
**TRESPASS** for breaking and entering a close of the plaintiff, called Hill close ground, and a certain other close, situate, &c., at Maidmorton, in the county of Bucks, and breaking gates, feeding with cattle, damaging soil with horses and carriages, cutting down trees, and carrying away branches. Plea, not guilty. And as to the second close, *lib. ten.* of defendant. The replication took issue on the plea. At the trial before *Garrow, B.*, at the last assizes for the county of Bucks (b), it appeared, that the plaintiff was the elder brother of the defendant; that on the 10th of August, 1761, *George Butcher*, the father of the plaintiff and defendant, was admitted tenant of a copyhold messuage and land, comprising Hill close ground, *habendum*, to him the said *George Butcher*, the elder, *William Scott Butcher*, his second son, and *George Butcher*, his eldest son (plaintiff), for the term of their lives, and the life of the survivor and survivors of them successively. In January, 1807, *George Butcher*, the elder, died. *William Scott Butcher*, the second son, remained in possession of the *locus in quo*, from the time of the death of *George Butcher*, the elder, till his own death in January, 1827. *William Scott Butcher*, by his will, dated 22d December, 1826, devised the *locus in quo* to *John Butcher*, the defendant, in fee, and appointed him sole executor of his will. On the death of the testator, the defendant entered into possession as devisee under the said will, but on the 10th March last, the plaintiff and his men cut asunder the chain which fastened the gate of the close in question, and entered thereon, and began to plough and sow the field, whereupon, defendant ordered plaintiff's men out of the close, and on their refusing to go out, he cut part of the gear of the plaintiff's horses. Verdict for the plaintiff, with leave to move to set aside the verdict, and enter a nonsuit.

(a) F. N. B. 204 D.

(b) Counsel for the plaintiff,

*Storks, Serj.*, and *F. Kelly*; for the defendant, *Robinson*, and *Munro*.

*Robinson*, for the defendant, now moved accordingly. It must be admitted, that the plaintiff was the rightful owner of the close in question, *William Scott Butcher* having no right to devise to the defendant, inasmuch as he had only a life estate in the premises; but the plaintiff, by virtue of the entry, had not such a possession as would enable him to maintain trespass. For that purpose, it was necessary that the plaintiff should have actual (a) and exclusive possession (b). Here the entry of the plaintiff not being acquiesced in by the defendant, the plaintiff had not obtained such possession.

Lord TENTERDEN, C. J.—There is no doubt, that if he who has the right enters, he can maintain trespass. Formerly, trespass was brought to try title (c); and the mere circumstance of the plaintiff's going upon the land and using it, is an entry, although he says nothing (d).

The other Judges concurring.

Rule refused (e).

(a) *Vide* 2 Roll. Abr. 553; Com. Dig. Trespass, (B).

(b) *Vide* *Wilson v. Mackreth*, 3 Burr. 1824; *Smith v. Milles*, 1 T. R. 480; *Wiltshire v. Sidford*, *post*.

(c) Ejectment is founded upon a right to enter, and make the demise to the nominal lessee. Whoever, therefore, can maintain ejectment, may enter peaceably without action; and upon such entry the legal possession vests with relation to the period at which the title of the party accrued; so that he may now sue for the mesne trespasses; which brings the right of possession, and the lawfulness of the entry directly in question. Thus to a plea of *lib. ten.* at the time of the alleged trespass, plaintiff replied that his father had been disseised by defendant, and that he had since entered upon defendant. Bro. Tresp. pl. 80. *Et vide* *ib.* pl. 127, 169, 187, 202, 227, 367, 423; *Jayson v. Rash*, 1 Salk. 209; *Rogers v. Pitcher*, 6 Taunt. 202, 7; 1 Marsh. 542. So where

*A.* having forfeited for treason, made a gift in tail, and after the death of the donee, *A.* was restored by act of parliament: this constructive seisin of the donee was held sufficient to entitle his wife to dower. *Arundel v. Willington*, T. 9, E. 3, fo. 24, pl. 17. The common action of trespass for mesne profits, after an *hab. fac. poss.*, is founded upon this principle; and if the plaintiff claims to be remitted to a constructive possession anterior to the demise in ejectment, so that he can no longer avail himself of the estoppel created by the judgment in ejectment, he raises the question of title in the old way.

(d) Co. Litt. 245 b.; 3 Tho. C. L. 59.

(e) And see *Taunton v. Costar*, 7 T. R. 431; *Turner v. Meymott*, 1 Bingh. 158; 7 J. B. Moore, 574, S. C.; *Girdlestone v. Porter*, Woodf. 542; *Nowell v. Roake*, *ante*, 170.

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WILLIAM FERRER and ANN ROLLASON, against  
JOHN OVEN. *7. B.C. 427.*

In debt on award by *A.* and *B.* against *C.*, where the submission was by *A.* and his wife, and *B.*, on the one side, and by *C.* and *D.* jointly and severally, on the other, the execution of the submission by the wife of *A.*, by *B.*, and by *D.*, must be proved.

THE declaration, which was in debt, stated, that certain differences and disputes having arisen, and being depending between the said *William Ferrer* and *Honorio* his wife, and the said *Ann*, and the said defendant, and one *Lacon Lambe*; they the said *William Ferrer* and *Honorio* his wife, and the said *Ann*, heretofore, to wit, on the second day of February, 1826, at London aforesaid, by a certain bond of arbitration, bearing date on that day, became bound to the said defendant and *Lacon Lambe*, in a certain penal sum in the said bond mentioned; and the said defendant and *Lacon Lambe*, then and there, by a certain other bond of arbitration, became and were bound to the said *William Ferrer* and *Honorio* his wife, and the said *Ann*, in a certain other penal sum in the same bond mentioned, which bonds were respectively conditioned, well and truly to stand to, obey, abide, observe, perform, fulfil, and keep the award, order, arbitrament, final end and determination of *James Thomas Woodhouse*, of, &c., and *William Back*, of, &c., arbitrators, indifferently named, elected and chosen, as well by and on the part and behalf of the said defendant and *Lacon Lambe*, as of the said *William Ferrer* and *Honorio* his wife, and the said *Ann*, to arbitrate, award, order, adjudge, and determine of and concerning all and all manner of action and actions, cause and causes of actions, suits, bills, bonds, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, both at law and in equity, at any time or times, theretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by and between the said parties; so as the award should be made in writing on or before the 5th day of March, then next ensuing: But if the said arbitrators did not make their award of and con-

cerning the premises by the time aforesaid, then to obey, abide, observe, perform, fulfil, and keep the award, order, arbitrament, umpirage, final end and determination of one *Thomas Davies*, a person indifferently named and chosen as an umpire between the said parties, of and concerning the premises, on or before the first day of June, then next ensuing. And they, the said defendant and *Lacon Lambe*, and the said *William Ferrer* and *Honoria* his wife, and the said *Ann*, did, by the said respective conditions, severally consent and agree, amongst other things, that the costs of a certain suit in Chancery, in which the said *William Ferrer* and *Honoria* his wife, and *Ann*, were plaintiffs, and the said defendant and *Lacon Lambe* were defendants, as well as of the reference, and the award to be made in consequence thereof, should abide the event of the said award, and that the said arbitrators or umpire, should tax and award the amount of costs to be paid by the party or parties liable to the payment thereof. That the said *James Thomas Woodhouse* and *William Back* did not make their award in the premises within the time for that purpose appointed by the said bonds. Whereupon the said *Thomas Davies*, the umpire appointed as aforesaid, having taken upon himself the burthen of the said arbitration, did in due manner, after the expiration of such time, and before the expiration of the time appointed for making the umpirage, to wit, on the 29th day of May, in the year 1826, aforesaid, at London aforesaid, make and publish his award or umpirage in writing, concerning the said differences and disputes, ready to be delivered to the said parties or such of them as should desire the same, and bearing date the day and year last aforesaid; and did thereby, (after awarding and directing that the said defendant should pay a certain sum of money to the said *William Ferrer*, and a certain other sum of money to the said *Ann* (a), as in the umpirage mentioned), award, order, and direct that the said defendant, his heirs,

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(a) Two other actions (*post*, 227 which shared the same fate as the principal case.) were brought for these sums,

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&c., should well and truly pay, or cause to be paid, unto the said *William Ferrer* and *Ann*, their executors, administrators, or assigns, on the 14th day of August next ensuing the date of the said umpirage, between the hours, &c., at the office of the said *William Back*, situated, &c., the sum of 41*l.* 16*s.* 1*d.*, being the amount of the costs incurred by them, the said *William Ferrer* and *Honor*^a his wife, and the said *Ann*, in respect of the said suit in Chancery, of the said reference, and of that his the said *Thomas Davies's* award or umpirage, after the same had been duly taxed by him the said *Thomas Davies*, in pursuance of the said bonds of arbitration; as by the said award or umpirage, reference being thereunto had, will, amongst other things, fully appear: Of which award or umpirage the said *John* afterwards, to wit, on the said 29th day of May, in the year 1826, aforesaid, at, &c., had notice. Nevertheless, the said defendant did not, on the said day in the said award or umpirage in that behalf mentioned, between the hours and at the place before-mentioned, pay or cause to be paid to the said *William Ferrer* and *Ann*, or to either of them, the said sum of 41*l.* 16*s.* 1*d.*, in the said award or umpirage mentioned, or any part thereof; nor hath the said defendant before or since paid the said sum, or any part thereof, to the said *William Ferrer* and *Ann*, or either of them, although he the said defendant was afterwards, to wit, on the said 14th day of August, and on divers, &c., requested by the said *William Ferrer* and *Ann* to pay them the said sum of 41*l.* 16*s.* 1*d.*, to wit, at, &c.; whereby an action hath accrued, &c. The declaration also contained counts for money borrowed, money paid, money had and received, and upon an account stated. Plea, *nil debet*. At the trial before Lord Tenterden, C. J., at the sittings at Guildhall after last Easter term (a), the execution by the defendant of the bond, in which he and *Lambe* were the obligors, was proved, as also the due execution of the umpirage. *Follett*, for the defendant, objected that it should also have been

(a) Counsel for the plaintiff, the defendant, *Follett*.
W. E. Taunton, and *F. Kelly*; for

proved that *Lambe* had executed this bond, and that the counter-bond should have been proved to have been executed by the two plaintiffs and Mrs. *Ferrer*, and he cited *Antram v. Chace* (a). A second objection taken, was, that the umpire had no authority to award between the plaintiffs on the one side, and the defendant alone on the other side, so as to give the plaintiffs a right of action on such award (b). Upon this a witness was called, who stated that he was present at the execution of the bond by *Ann Rollason*, and that he thought it was also executed by *William Ferrer*; but the attesting witness to their execution was not called. No evidence was attempted to be given of the execution by *Lambe*, or Mrs. *F.*; but it was proved that the defendant had attended before the arbitrator. A verdict was found for the plaintiffs; the learned Judge reserving both the points made by the defendant's counsel.

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Follett having, in Trinity term, obtained a rule *nisi*, for entering a nonsuit upon the first objection taken at the trial,

Taunton now shewed cause. The learned Judge was of opinion at the trial, that the execution of the bond by the wife would have been a nullity, and need not be proved. With regard to execution by the plaintiff, it was proved that the plaintiff's name was subscribed to the instrument. There was no evidence of the execution of the other bond by *Lambe*: but neither does the declaration contain any averment that the parties did execute; it merely states that they had become bound. *Antram v. Chace*, is very distinguishable from the case now before the Court. Here there is no evidence that *Lambe* had any interest in the matters referred. The bond appeared in evidence to be

(a) 15 East, 209.

v. *White*, 1 Brod. & Bingh. 350.

(b) This objection was afterwards abandoned; and see *Winter* and the cases there cited.

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a joint and several bond, with several conditions. In *Antram v. Chace*, the execution by the defendant was founded upon the expectation that the instrument would be executed by the other parties, who appeared to have an interest in the subject matter. In the present case, it was unnecessary to prove the execution of the deed by *Lambe*, until the defendant had first shewn that *Lambe* had an interest.

Follett, contra. The plaintiffs did not make out a cause of action by legal proof. No debt was created by this umpirage, unless all the parties who were to be affected, entered into a binding agreement to submit to it. It was necessary to aver in the declaration, as has been done, that all the parties did submit; and it was necessary to prove that averment before the award could be received in evidence. It does appear upon the face of the declaration, that *Lambe* was interested, because he is stated to be a co-defendant in a suit in Chancery, the costs of which are to abide the event of the award. It was incumbent on the plaintiffs to prove, not only his execution, but also the execution by the plaintiffs and by *Ferrer's* wife. [Lord *Tenterden*, C. J. Was there not sufficient evidence of the execution by *Ferrer* and *Rollason* as against the defendant, who refused to produce that bond after notice?] There was no evidence that the bond was in defendant's possession; it might have been in *Lambe's*, the co-obligor's. There are several authorities establishing the position, that wherever an award is attempted to be enforced between any of the parties, it is essentially necessary in the first place to shew that the arbitrator was properly empowered to make the award, by proving a binding *mutual* submission by every one who is to be affected by it; *Dilly v. Polhill* (a), 2 Wms. Saund. 61 n. (g); *Biddell v. Dowse* (b). The reason is, that one person does not agree to be bound, unless all the parties between whom the differences exist,

(a) 2 Stra. 923.

(b) 6 B. & C. 255.

are bound also; *Antram v. Chace* (*a*), is precisely in point, except that this case is stronger; because here there is an averment in the declaration, that all these parties had executed the bonds, and it being necessary to shew a mutual submission, it must be proved as laid (*b*). The execution by the wife should also have been proved, because although there might be no *legal* remedy against her upon it, her submission would alter the effect of the award; *Berry v. Wade and Ux* (*c*).

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LORD TENTERDEN, C. J.—I do not see that these authorities can be got over. The rule must be made absolute.

BAYLEY, J.—This action is unfortunately brought, not on the bond, but upon the umpirage (*d*). It is averred, that there was a submission by bond by plaintiff and wife, and by defendant and *Lambe*. The defendant might never have consented unless *Lambe* joined, and there was evidence that he was concerned with the defendant in Chancery.

(*a*) 15 East, 209, *ante*, 227.

(*b*) See *Williamson v. Allison*, 2 East, 449, 452.

(*c*) Finch, 180.

(*d*) If the action had been *on the bond*, it would have lain upon the defendant to discharge himself from the penalty, by shewing a performance of the condition. This would have transferred the burthen of proof from the plaintiff to the defendant; whereas in debt *on the award*, a defendant by pleading *nil debet*, not only throws the burthen upon the plaintiff, but reserves to himself the power of setting up at the trial any number of defences to which it may be found convenient to resort. If the plaintiff had sued on the sub-

mission bond, one action would have been sufficient; but in suing on the award, it was necessary for each party to whom money was directed to be paid, to bring a separate action (*ante*, 223 (*a*)). In declaring on the award, however, the plaintiff has this advantage, that if he obtains judgment by default or on demurrer, the expense and delay of suggesting breaches and of executing a writ of inquiry at *Nisi Prius*, under the statute 8 & 9 W. 3, cap. 11, (*Welch v. Ireland*, 6 East, 613, 2 Smith, 666), are avoided. And see Com. Dig. Arbitrament, I. 2, 4, 6; Kyd, on Awards, 298, 289; 2 Wms. Saund. 62 b, note (*f*).

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HOLROYD, J.—The case of *Dilly v. Polhill* (a), is conclusive.

LITTLEDAL, J., concurred.

Rule absolute.

(a) 2 Stra. 923.

TABRAM, Gent, one, &c., v. HORN.

A. delivered papers to B., an attorney, telling him, "that she was entitled to an estate, and that she would pay him if she recovered it."

B. took the papers, saying, "that he would do what he could for her," and, without further communication, commenced an action of ejectment, which he afterwards abandoned under the conviction that A. had no title:—

Held, that B. acted without due authority, both in commencing and discontinuing the ejectment, and was not entitled to recover the costs thus incurred.

ASSUMPSIT on an attorney's bill. Plea, non assumpsit, and issue thereon. At the trial, before *Alexander*, C. B., at the last assizes for the county of Cambridge (a), the case was this. The plaintiff was an attorney at Cambridge, and the defendant a single lady residing at Welney, in Norfolk. The defendant, believing that she was entitled, as heirress at law of her deceased father, to a house at Welney, of which he had died in possession, and which he had taken many years before as devisee under his father's will, applied to the plaintiff on the subject. She delivered to him certain papers, stating, that she had an estate at Welney, and that she had an uncle who would produce the money for her, if she recovered the estate. The plaintiff took the papers, saying, "he would see what he could do for her." No express agreement was entered into between them, but the defendant "gave the plaintiff directions to work for her." The plaintiff accordingly, without further communication with the defendant, commenced an action of ejectment against the tenant in possession of the house in question, but after he had

(a) Counsel for the plaintiff, defendant, *Storks*, Serjt. *F. Kelly* and *Gunning*; for the

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incurred expenses to the amount of 30*l.*, discovered that the defendant's father had been interested in the house merely as tenant for life, and that the defendant consequently had no title to it, whereupon he, without communicating with the defendant, discontinued the ejectment, and sent in his bill of costs. When the bill was delivered to the defendant, she said, she could not pay it then, or any part of it. This was the account of the transaction given by the plaintiff's witnesses. On the part of the defendant, a witness was called, who stated that he saw the plaintiff at his office, and told him that the defendant had property under her father's and grandfather's will, and that she had the papers, but had no money. The plaintiff said he should like to see the papers, and the witness carried them to him a few days afterwards, when the plaintiff said, he could not do any thing further until he saw the defendant. The witness and the defendant afterwards called together upon the plaintiff. The defendant then said, if she got the property that was her's, she would pay the plaintiff: to which the plaintiff replied, that he had no doubt that part of the property was her's, and he would undertake and get it for her. Upon this evidence, the Lord Chief Baron told the jury, that if they were of opinion, either that the plaintiff had undertaken the business upon the terms that he should not be paid unless he succeeded, or, that he had improperly proceeded in the ejectment after he knew that the defendant had no title to the premises, without giving her notice; in either of those cases the defendant was entitled to a verdict. The defendant's evidence went some length in support of the first proposition, but in that respect it was somewhat at variance with the plaintiff's evidence, by which it also appeared, that when the plaintiff's bill was delivered to the defendant, she did not refuse to pay it absolutely, but merely stated that she *could* not pay it *then*. With respect to the second point, it appeared to him, upon the whole, that all the business had been done, *before* the plaintiff had discovered the

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defendant's defect of title. The jury, however, would take the whole case into their consideration. The jury found a verdict for the defendant.

F. Kelly moved for a new trial, upon two grounds ; first, that the learned Judge had not properly directed the jury ; and secondly, that the verdict was unsupported by the evidence. There was no evidence of an express agreement by the plaintiff to undertake the business, on the terms that he should not be paid unless he succeeded ; and he certainly could not be bound by any thing less than an express agreement to that effect, even if he could be bound by any such agreement, however formal and precise. Upon that point, therefore, the learned Judge ought to have told the jury that the plaintiff was entitled to recover. Having received a general retainer from the defendant, the plaintiff was authorized to commence the action of ejectment, and the fact of his client's title turning out defective, did not afford a legal ground of defence to an action brought by him upon his bill (a). When the discovery of the defect of title was made, the plaintiff was equally authorized to abandon the ejectment. In so doing he acted in the way most for the interest of his client, and acting as he did under a general retainer, the express authority of the defendant was not necessary to justify either the commencing or the discontinuing the action.

(a) Negligence in the conduct of a cause, where it is not so gross as to deprive the client of all benefit, is no defence to an action on the attorney's bill. *Templer M'Lachlan*, 2 New Rep. 136. Nor, that he had neglected to follow the instructions of his client merely for delay. *Johnston v. Alston*, 1 Camp. 176. Nor, that the items in the bill were for suing out a commission of bankrupt, under a misrepresentation of the plaintiff, that it would operate

in the isle of Man ; and that it had been wholly fruitless ; as the commission cannot be treated as a nullity. *Bismore v. Birnie*, 2 Stark. Rep. 59, *tamen quare*. Nor, that no benefit has been derived, where the failure does not result wholly from the plaintiff's negligence. *Das v. Ward*, 1 Stark. Rep. 409. *Secus*, where the charges are incurred entirely through gross ignorance, inadvertence, or negligence. *Montriou v. Jeffreys*, 1 R. & M. 317 ; *Allison v. Rayner*, post, 241.

Upon the other point, the verdict was clearly unsupported by the evidence, for it was proved, and so stated by the learned Judge to the jury, that all the business charged for was done before the plaintiff discovered that his client had no title to the premises sought to be recovered. In either point of view, therefore, the verdict was wrong, and the plaintiff is entitled to a new trial.

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LORD TENTERDEN, C. J.—I cannot say that the verdict found by the jury in this cause is wrong, in either of the views now taken of the case. It is clear, upon the evidence on both sides, that the plaintiff was made acquainted with the fact, that the defendant was destitute of immediate resources, and that she told him she would pay him *if she recovered* the property to which she supposed herself entitled. It is equally clear that the plaintiff undertook the business upon those terms; for he said, in the language of one witness, that he would see what he could do for her; and according to another, that he had no doubt that part of the property was her's, and that he would undertake and get it for her. But if he did not undertake the business on those terms, I am of opinion that he acted without proper authority and caution, first in commencing the ejectment, and afterwards in discontinuing it, without previously communicating his intentions to the defendant. He was not justified in the first instance in running the defendant to expense, without her express authority; nor in the second, in abandoning the action, and saddling her with the costs, without informing her of the opinion he had formed of her case, and making further inquiries into the real nature of her claim to the property. For these reasons, it seems to me that the verdict found for the defendant ought not to be disturbed.

BAYLEY, J.—I am of the same opinion. The plaintiff did not receive instructions to commence an action, but only to inquire into the defendant's title; and he ought to

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have made that inquiry, and to have communicated the result of it to the defendant, before he incurred the expense, which he now seeks to be reimbursed. Having proceeded without the authority of his client, he has proceeded at his own peril, and he must abide the consequences of his own rashness and precipitancy.

The other Judges concurred.

Rule refused.

BAKER v. ALLAN.

Where a bill of *Middlesex* issues, upon an affidavit of debt duly sworn, pursuant to the 12 *Geo.* 1, c. 29, s. 2, an office copy of the same affidavit will authorize the issuing of a *latitat* into a *different* county.

BARSTOW had obtained a rule, calling upon the plaintiff to shew cause why the bail-bond, executed in this case, should not be given up to be cancelled, and, in the mean time, that proceedings should be stayed, upon an affidavit, stating the following facts. A bill of *Middlesex* was issued against defendant, at the suit of the plaintiff, on an affidavit of debt, sworn at the bill of *Middlesex* office, before the proper officer. The defendant could not be arrested under that process, and the plaintiff's attorney, having obtained an office copy of the affidavit of debt, filed it at the office of the signer of writs, and sued out a writ of *latitat* against the defendant, into the county of *Surrey*, under which he was arrested. The objection was, that no affidavit of debt had been sworn before a judge, or a commissioner, or the officer by whom the writ of *latitat* was issued, or his deputy, pursuant to the provisions of the statute 12 *Geo.* 1, c. 29, s. 2 (a).

(a) Which enacts, "that in all cases where the plaintiff's cause of action shall amount to the sum of 10*l.*, or upwards, an affidavit shall be made and filed of such cause of action; which affidavit may be made before any judge or commissioner of the Court out of which such process shall issue, authorized to take affidavits in such

Hutchinson shewed cause. He produced an affidavit, stating that it was the constant practice for the officers of the Court to issue writs into one county, upon office copies of affidavits, sworn for the purpose of suing out previous writs into other counties; and contended, that such a practice was consistent with the intent and object of the act of parliament. A writ of *latitat* is a continuance of a bill of Middlesex. According to the ancient practice, a bill of Middlesex was always sued out in the first instance; and, in the present day, every writ of *latitat* necessarily assumes the previous issuing of a bill of Middlesex (*a*). *Dalton v. Barnes* (*b*), will perhaps be relied on by the other side; but it differs materially from the present case. It was, undoubtedly, there held that a *special capias*, issued upon an affidavit of debt, sworn at the bill of Middlesex office, was irregular; but the ground of that decision was, that the second process there was in its nature essentially different from the first. Here, the whole proceeding is by bill, and the second process is a continuance of the first. The view of the subject now suggested, is the same that was taken by the court of Common Pleas, in the very recent case of *Dorville v. Whoomwell* (*c*). It was there ruled, that where a first *capias* is issued on an affidavit of debt, filed with the filacer of one county, if, *instead of a testatum*, a second *capias* is issued into another county, a new affidavit of debt must be filed with the filacer of the second county. The very ground of the decision in that case, namely, that the second process was not a *testatum*, renders it an authority in favour of the proceedings here; because a *latitat* is a *testatum* bill of Middlesex (*a*). So, in a still later case of *Evans v. Bidgood* (*d*), where the defendant was arrested on a *testatum capias*, into Devonshire, without any

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Court, or else before the officer who shall issue such process, or his deputy; which oath such officer, or his deputy, are empowered to administer."

- (a) *Post*, 237 (a).
- (b) 1 M. & S. 230.
- (c) 10 J. B. Moore, 318, 3 Bingham. 39.
- (d) 4 Bingham. 63.

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affidavit filed on issuing the *testatum capias*, an affidavit having been filed on issuing a previous *capias* into Cambridgeshire, the proceedings were held to be regular, upon the ground that the second process was a continuance of the first.

Barstow, in support of the rule. The course pursued by the plaintiff in this case, must be admitted to be conformable to the general practice; but if that practice is inconsistent with sound principles, and with the provisions of the statute, it cannot, however long persevered in, be sanctioned by the Court. The ancient common law practice cannot be prayed in aid of the present proceedings, if, indeed, it could be relied upon in any case, because it does not appear that the bill of Middlesex has been returned by the sheriff; whereas, by the ancient practice, it was necessary that a return of *non est inventus* should be made by the sheriff to the bill of Middlesex, before the writ of *latitat* could be sued out; which return was always recited in the writ. But the ancient practice has in reality no bearing upon the important question now before the Court, which depends entirely upon the construction to be given to the language of the second section of the statute, 12 Geo. 1, c. 29 (a). That statute (except as regarded the principality of Wales, and the counties Palatine, with reference to which, a previous act of 11 & 12 W. 3, c. 9, had passed), first rendered an affidavit of debt necessary, as a preliminary to the holding a party to bail; and it provided, that no person should be held to bail, except upon an affidavit of debt sworn before a judge, or commissioner of the court out of which the process issued, or before the officer issuing the process, or his deputy. What authority can an office copy of the affidavit upon which a bill of Middlesex has issued, give to the signer of the writs to issue a *latitat*? Clearly none. The moment the bill of Middlesex issues, that affidavit is *functus*

(a) *Ante*, 232 (a).

officio : it would, indeed, authorize the issuing of an *alias* or *pluries* writ, from the same office into the same county but it could not possibly authorize the issuing of a different writ, from a different office, into a different county. Where the affidavit is sworn before the signer of the writs, and a *latitat* is thereupon issued into one county, a subsequent writ may be issued into any other county, Middlesex excepted, upon the same affidavit; *because*, the signer of the writs is the proper officer for the issuing of writs into every county, except Middlesex. And this is the real distinction upon which the question turns; namely, that an affidavit sworn before a particular officer, will authorize the issuing of writs into every county into which that officer has authority to send process; but into no other; and it will be found to have been recognized and acted upon in every case which has been decided upon the subject. The cases cited on the other side, are, in reality, no authorities in favour of the present plaintiff. It is true, that in *Dalton v. Barnes* (a), the second process was in point of fact, a special *capias*, issued upon an affidavit sworn at the bill of Middlesex office. But that was not the reason assigned by the Court for holding the process irregular; on the contrary, they declared, in the most general terms, that "an affidavit made for one specific object, could not be transferred to another." Here, that very thing is attempted to be done; for the affidavit was made for the specific object of arresting the defendant under one process in the county of Middlesex, and it is transferred to the different object of arresting him under different process in the county of Surrey. Again, the Court there said, that "perjury could not be assigned on the office copy of the affidavit;" and so here, an indictment for perjury could not be supported upon the office copy of the affidavit, nor, indeed, even upon the original affidavit itself, unless a connexion could be shewn between the first and second process, which is impossible; and even

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(a) 1 M. & S. 230.

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if it could be shewn, the additional burthen of proof which would then rest upon the defendant, in his character of prosecutor, would be a difficulty to which the plaintiff has no right to expose him. In *Boyd v. Durand* (a), the second process issued under the authority of an office copy of an affidavit of debt, and was held regular; but that was upon the ground that both the first and second process were issued by the same officer, and, consequently, that the affidavit must have been sworn before the officer by whom the process in question was issued. Upon precisely the same principle, in *Anderson v. Hayman* (b), the second process was held irregular; for there the second process was not issued by the same officer who issued the first, and; consequently, there was no affidavit sworn before the second officer to authorize the writ which he issued: and the distinction already alluded to, as laid down in *Dalton v Barnes* (c), was there referred to and recognised. It must be admitted that, in *Dorville v. Whoomwell* (d), the Court intimated, that if the plaintiff had sued out a *testatum*, his second process would have been regular; but still, upon the same principle, namely, that the same officer had authority to issue process for both counties; and they referred to the decision in *Anderson v. Hayman* (b), which they said was founded in good sense. In the latest case upon this subject, *Evans v. Bidgood* (e), the Court declared expressly that a *testatum* should have been issued, because the officer by whom the first process was issued, was also the officer authorized to issue the second process. Upon the whole, then, it seems clear that the words of the statute, the principle of the decided cases, and the good sense and reason of the thing, all warrant the defendant in contending that an affidavit sworn for the purpose of issuing process into one county, will not authorize the issuing of process into a different county, unless the officer before

(a) 2 Taunt. 161.

(b) 8 Taunt. 242, 2 J. B. Moore,
 192.

(c) 1 M. & S. 230.

(d) 3 Bing. 39, 10 J. B. Moore,
 318.

(e) 4 Bing. 63.

whom it is sworn has authority to issue process into both counties: and if that be so, it follows that the process, under which this defendant was arrested, is irregular.

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Cur. adv. vult.

Judgment was afterwards delivered by,

Lord TENTERDEN, C. J.—This case involves a question of great general importance, and we were anxious to give it full consideration, before we decided upon it. [His Lordship then stated the facts contained in the affidavits, and the nature of the question raised upon them, and thus proceeded]. The practice, in uniformity with which the present plaintiff has acted, has obtained for a long period of years; and unless we see clearly either that it violates some established legal principle, or that it defeats the intent and object of the act of parliament, we think it very desirable to abstain from disturbing that practice. We have carefully considered the subject, and we are of opinion, first, that the writ of *latitat*, issued in this case, may be considered as a continuance of the bill of Middlesex (a); and, secondly, that an affidavit sworn before the officer who had authority to issue the first process, and of which the second process was a continuance, substantially satisfied the requisites of the statute. The defendant's rule, therefore, must be discharged; but as the question was one of nicety, and well worthy of discussion, we shall discharge the rule without costs.

Rule discharged, without costs.

(a) See *Plummer v. Woodburne*, 7 D. & R. 25, 4 B. & C. 625. In that case, the last process, which alone contained the *ac etiam* clause, was a *latitat*.

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A joint-stock company, in which A., B., and C., are shareholders, is dissolved; A. and B. being sued by a creditor of the concern, employ C., who is an attorney, to defend them. C. cannot sue A. and B. for his bill of costs.

MILBURN, Gent., one, &c. v. Codd and another.

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ASSUMPSIT for work and labour as an attorney. Plea, non-assumpsit. At the trial before Lord Tenterden, C. J., at the sittings in Middlesex, in last Trinity term (a), it appeared that the plaintiff and defendants had been members of "The London Carrier Company," which was dissolved on the 3d May, 1826. The Company being considerably in debt at the time of its dissolution, defendants, as two of the proprietors, and two of the committee of management, were sued by several of the creditors of the Company. The defendants employed the plaintiff to defend these actions, and a bill of costs, amounting to 48l., was incurred; to recover which the present action was brought. For the defendants it was objected, that the plaintiff and the defendants were partners in the transaction out of which this claim arose, and that an action of assumpsit (b) could not be maintained. The learned Judge was of opinion that the plaintiff, if employed by the defendants, had a right to call upon them for the

(a) Counsel for the plaintiff, *Denman*, C. S., and *Andrews*; for the defendants, *J. Williams* and *Goulburn*.

(b) The only action given by the common law to compel the settlement of an open account between partners, is the action of account. A concurrent remedy lies in a court of Equity, by filing a bill for an account; and as a court of Equity has more extensive jurisdiction to compel a discovery, and the production of evidence, than can be exercised by auditors appointed in a court law, in a common law action of account, the proceeding by bill is become so much a matter of course, that it is resorted to in cases where no

extraordinary power is wanted, and where the matter would be brought to a much cheaper and more expeditious termination in a court of Law. Where upon accounts between partners, a balance has been struck with a promise express (*Forster v. Allanson*, 2 T. R. 479) or implied (*Rackstraw v. Imber*, Holt, N. P. C. 368), to pay the amount, an action of debt, or indebitatus assumpsit upon an account stated, may be supported. And such promise is not discharged by subsequent partnership transactions upon which the balance, if taken, would be against the promisee; *Preston v. Strutton*, 1 Anstr. 50.

amount of his bill of costs incurred about their defence, and they might call upon the other members of the Company for contribution. His lordship told the jury, that if they thought defendants had employed plaintiff, they would find a verdict for that portion of the bill of costs which related to the defence of the actions. A verdict was accordingly returned for the plaintiff, damages 34*l.* 16*s.* 2*d.*

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J. Williams having, in the course of the same term, obtained a rule nisi, for a new trial,

Denman, C. S., now shewed cause. This case is distinguishable from *Hodnes v. Higgins* (a); because here there was a specific engagement between the parties. The charges in the plaintiff's bill do not commence until after the Company was at an end; the defendants, therefore, employed the plaintiff in their individual capacity, and not as members of the Company (b).

J. Williams, (with whom was *Goulburn*), *contra*, was stopped by the Court.

LORD TENTERDEN, C. J.—The actions which the plaintiff defended, were actions brought against the defendants as members of a partnership of which the plaintiff was also a member. When an action was commenced, it was the duty of all the partners in the late company, either to pay the money or to resist the demand; and in the case of resistance, the expense ought to be paid by all, the plaintiff among the rest(c). The plaintiff cannot say that there was

(a) 2 D. & R. 196; 1 B. & C. 74.

(b) And see *Scrace*, gent., one, &c., v. *Whittington*, gent., one, &c., 3 D. & R. 135; 2 B. & C. 11.

(c) And see *Cowell v. Edwards*, 2 B. & P. 268; *Deering v. Earl of Winchelsea*, *ib.* 270; *Collins v.*

Prosser, 3 D. & R. 112, 1 B. & C. 682; *Laver v. Nelson*, 1 Vernon, 456; *Skip v. Huey*, and others, 3 Atk. 91; *Offley and Johnson's* case, 2 Leon, 166; *Gifford, ex parte*, 6 Vesey, jun. 805; *Walton v. Hanbury*, 2 Vern. 592; Bac. Abr. Obligation D. 5; *Pothier Traité du Contrat de Société* n^o. 132.

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no defence ; he and all the others derived benefit from their defending, and therefore he cannot maintain this action.

BAYLEY, J.—The original actions were brought upon demands for which these parties were jointly liable, the amount, ought, therefore, to have been paid out of the funds of the Company ; or if it was right to resist these claims, the expense of defending ought to be paid out of the funds of the Company. The plaintiff, who was the attorney conducting the defence, cannot say that the actions were improperly defended (*a*). The plaintiff does not cease to be a partner until the concern is at an end. If the plaintiff recovered in this action, the defendants would be entitled to call upon him for contribution.

LITLEDAL, J.—This action cannot be supported. The creditors were entitled to be paid by the whole Company. If the actions could be defended upon reasonable grounds, they ought to have been defended, but then the plaintiff cannot sue those two persons, because all ought to contribute, and he defended for his own benefit. If the defence was frivolous and nugatory, the plaintiff being employed, must have known that as well or better than his clients. As against him it must be taken to have been a fair defence. Taking it either way, he has no right of action against those to whose expenses he was bound to contribute (*b*).

Rule absolute.

(*a*) See the next case.

(*b*) *Supra*, 238, note (*c*).



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ALLISON, Gent., one, &c., v. RAYNER.

ASSUMPSIT for work and labour as an attorney. The defendant pleaded non assumpsit, and paid 36*l.* into Court. At the trial, before *Hullock*, B., at the last Spring assizes, for the county of York (*a*), it appeared that the defendant had in 1821, been appointed assignee of one *Jackson*, an insolvent. In that capacity he had brought two actions against *Horsfall* and others, and *Clarke*. The actions being referred, the arbitrator directed a nonsuit to be entered in each. In August, 1826, the now plaintiff, who had been employed to prosecute those actions, delivered his bill of costs, containing, first, items amounting to 11*l.* 1*s.* 5*d.* for general business relating to the insolvency; then a full statement of the charges in the former of the two actions, amounting to 24*l.* 15*s.*; and then proceeding thus:—

An attorney cannot recover from the assignee of an insolvent debtor, the amount of a bill of costs incurred in proceedings requiring the consent of a meeting of creditors, without proving that such consent was obtained, or that the client was informed he was proceeding at his own risk.

Michaelmas Term, 1821.

Same Court.—*Yourself* v. *John Clarke*.

£. s. d.

The like costs in this action as in the one against <i>Horsfall</i> and others, with award, &c., although the proceedings were considerably longer, say	24	15	0
To extra costs of bail, writ, warrant, arrest, and exception to bail and justification, in this action, beyond the above	2	12	6
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Credit was given for 3*l.* 7*s.* 4*d.* received from a debtor to the estate, which left a balance of 59*l.* 16*s.* 7*d.*

(*a*) Counsel for the plaintiff, *F. Pollack*, and *Patteson*.
D. F. Jones; for the defendant,

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It was objected, that the plaintiff could not recover for his services in the prosecution of these actions, inasmuch as it was not proved, nor did it even appear from the bill itself, that the consent of *Jackson's* creditors, or the approbation of a commissioner of the Insolvent Debtors' Court, as required by 1 *Geo.* 4, c. 19, sect. 11 (*a*), had been obtained, and that the statement of charges in the action against *Clarke* was too general (*b*). Under the direction of the learned Judge, a verdict was found for the plaintiff, damages 23*l.* 16*s.* 7*d.* (making with the sum paid into Court, the 59*l.* 16*s.* 7*d.* claimed), with leave for the defendant to move to enter a nonsuit.

In last Easter term, *Pollock* moved accordingly, and referred to *Montrieu v. Jeffrys* (*c*).

Jones, Serjt., now shewed cause. It is contended, that

(*a*) Which provides, that "no suit at law be proceeded in further than an arrest on mesne process, or suit in equity by any assignee or assignees of any such prisoner's estate and effects, without the consent of the major part, in value, of the creditors of such prisoner, who shall meet together pursuant to a notice to be given, at least fourteen days before such meeting, in the London Gazette or other newspaper, which shall be published in the neighbourhood of the last residence of such prisoner, for that purpose, and without the approbation of one of the commissioners of the said court." By 7 *Geo.* 4, c. 57, sect. 24, the consent of creditors, and the approbation of the Insolvent Debtors' Court, or a commissioner, are required only for the submission of disputes to arbitration, and commencing suits in Equity.

(*b*) 2 *Geo.* 2, c. 23, sect. 23, directs, that "no attorney or solicitor of any of the courts aforesaid, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements at law or in Equity, until the expiration of one month or more after such attorney or solicitor respectively shall have delivered to the party or parties, to be charged therewith, or left for him, her, or them, at his, &c., dwelling-house, or last place of abode, a bill of such fees, charges, and disbursements, written in a plain, legible hand, and in the English tongue (except law terms and names of writs), and in words at length (except terms and sums), which bills shall be subscribed with the proper hand of such attorney or solicitor respectively,"

(*c*) 1 *Ryan & Moody*, 317. And see 2 *C. & P.* 113. *S. C.*

the plaintiff was not entitled to recover, because he was not prepared to shew the assent of *Jackson's* creditors to the bringing of the actions, against *Horsfall*, and *Clarke*. In *Doe d. Clark v. Spencer (a)*, and *Doe d. Spencer v. Clark (b)*, the court of Common Pleas held, that in an action brought by the assignee of an insolvent debtor, the circumstance of his having omitted to call a meeting of the creditors, or to obtain the approbation of a commissioner, was no defence. The absence of the consent of the creditors, and of the approbation of the commissioners, might have been a ground for applying to this Court to stop the action, or the Insolvent Debtors' Court might have been called upon to interfere. Should the defendant's argument prevail, it would be necessary for an attorney to come prepared, not merely to prove the retainer, and the work done upon that retainer, but the number of the insolvent's creditors, the meetings of such creditors, and a variety of other particulars, which must materially increase the trouble, and enhance the expense of such an action. The object of the act was to prevent the assignee from speculating upon an action, and to give the creditors an opportunity of preventing a useless expenditure of the assets. [Lord *Tenterden*, C. J. Have you any affidavit shewing that the authority of the creditors was obtained?] The plaintiff is taken by surprise, having supposed that the rule was obtained upon the objection to the form of the bill. If there was no authority, yet the assignee might chuse to run the risk in order to prevent a party's getting out of the way. [Lord *Tenterden*, C. J. Is it not the duty of an attorney to tell his client, that if he does so proceed, he does it at his own peril?] It will be necessary, besides the retainer, to prove what passed in private between the attorney and his client. [Lord *Tenterden*, C. J. The attorney should take a written retainer. *Bayley*, J. The assignee may commence an action without first waiting to obtain the consent of the

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(a) 3 Bingham 203.

(b) 3 Bingham 370.

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creditors]. Where work is proved to have been done, it lies upon the defendant to shew that no advantage was obtained from it; 36*l.* was paid into Court, on account of the work for which it is now pretended the defendant was not liable. If the defendant discovered that the items relating to the actions against *Clark* ought to have been set out fully in the bill, he should have paid money into Court specifically, with reference to one action only. Neither of the objections go to a nonsuit; for the first part of the bill, for general business done before these actions were commenced, is not open to either of them. At all events there was a *primâ facie* case. In *Montriau v. Jeffrys (a)*, the misconduct of the plaintiff appeared in evidence; and it lay upon the defendant to shew it in this case; *Templer v. Mc Lachlan (b)*.

LORD TENTERDEN, C. J.—It is an important part of the jurisdiction of this Court, to see that their officers perform their duty towards their clients. Here it was the duty of the attorney to inform his client, that if he proceeded further than an arrest on mesne process, without the consent of a meeting of creditors, he would do it at the risk of paying the costs out of his own pocket. It was a material point in this case, whether such consent had been obtained, and the question is, whether the attorney was bound to prove the affirmative. It is a rule, that where the interest of any person rests upon an affirmative, it is for him to prove the affirmative. The interest of the attorney in this case rests upon the affirmative. I think, therefore, he was bound to prove it, and that not having done so, he is not entitled to recover.

BAYLEY, J.—I am of the same opinion. I agree to *Templer v. Mac Lachlan (c)*; but there the objection

(a) 1 Ryan & Moody, 317; 2 Carr. & P. 113, S. C.

(c) 2 N. R. 136; and see *Tatram v. Horn*, ante, 228.

(b) 2 New Rep. 136, ante, 230(a).

did not go to the whole for which the party sued ; here I think it does (a). I think there was some evidence of the fact, that no meeting of the creditors to consent took place ; for no charge is found, in the attorney's bill, for such an attendance. Then you deprive the defendant of the means of reimbursing himself, by not informing him of the necessity of so doing.

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HOLROYD, J.—I am of the same opinion. It was the duty of the attorney to see that his client proceeded in such a way as to be able to reimburse himself out of the estate.

LITLEDALE, J., concurred.

Rule absolute (b).

Jones, Serjt., then applied to have it referred to the Master, to inquire whether there were in the bill any items not coming within the rule.

Lord TENTERDEN, C. J.—You may do that at your own expense (c).

(a) And see *Havelock v. Geddes*, 10 East, 555 ; *Farnsworth v. Garrard*, 1 Campb. 38 ; *Duncan v. Blundell*, 3 Stark. N. P. C. 6 .

(b) And see *Daz v. Ward*, 1 Stark. N. P. C. 409 ; *Tabram*, gent. one, &c. v. *Horn*, ante, 228.

An attorney's bill is not vitiated by a mistake in dates, by which the client cannot be misled ; *Williams v. Barber*, 4 Taunt. 806. S. P., as to mistakes in bills of particulars of demand, *Millwood v. Walter*, 2 Taunt. 224. See also

Forman v. Drew, 6 D. & R. 75, S. C. 4 B. & C. 15 ; *Reeves v. Lambert*, ib. 214 ; *Nias v. Nicholson*, 1 R. & M. 322, 2 C. & P. 120, S. C., as to mistakes in the schedule of an insolvent debtor in describing the creditor, and the amount of the debt.

(c) Nothing further appears to have been done ; the 36*l.* paid into Court far exceeded the claim for general business beyond the costs of the two actions.



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ATTWOOD v. SMALL and others.

A., B., and C., directors of a projected joint-stock company, contract in their own names with D., a shareholder, for the purchase of a mine, and after the formation of the company, enter into further agreements with D., respecting the purchase, with a clause, exempting them from personal liability upon certain parts of the contract:—Held, that A., B., and C., may be sued by D., upon those parts of the contract to which the exemption does not apply.

Where an agreement, duly stamped, contains a special clause for referring disputes to arbitration, and in a second agreement

between the same parties, it is stipulated that disputes as to the construction of the second agreement shall be decided by arbitration, according to the provision of the first agreement, a stamp adapted to the number of words actually written in the second agreement, without counting the clause referred to, is sufficient.

ASSUMPSIT. The declaration stated, that on the 10th of June, 1825, at, &c., by a certain agreement then and there made, by and between plaintiff of the one part, and defendants of the other part, plaintiff agreed to sell to defendants, and defendants agreed to purchase of plaintiff, the freehold and leasehold estates, iron-works, collieries, and other property mentioned and comprised in the schedule thereunder written, at and for the price or sum of 600,000*l.* to be paid as thereafter mentioned. And it was agreed that the sum of 25,000*l.* in Exchequer bills, should, on the signing of the said agreement, be paid by the defendants into the hands of Messrs. *Hoare, Barnetts and Co.*, Lombard Street, in the city of London, bankers, to the joint account of defendants and plaintiff, by way of deposit, which Exchequer bills were to be paid over to plaintiff, on giving possession as thereafter mentioned. And defendants agreed to pay to plaintiff, the further sum of 200,000*l.* on the 1st day of October, then next; and plaintiff agreed, on payment of such sum of 200,000*l.* and on the title's being accepted, to give full and complete possession of the several freehold and leasehold estates, and other property thereby contracted to be sold unto defendants, and at the same time, if required, to convey, assign, and assure by good and sufficient conveyances and assurances, to trustees, in trust to secure the residue of the purchase money and interest, by the instalments thereafter mentioned, and subject thereto, in trust for the purchasers, or as they should direct and appoint (a): and plaintiff agreed on his part, forthwith, or within one

(a) *Post*, 249 (a).

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month, to deliver to defendants or their solicitors, an abstract of title to the property sold, and to deduce a good title thereto, with such exceptions, nevertheless, as were stated in the schedule to the said agreement, and except that plaintiff should not be required to shew the lessors' title to the leasehold property, or their leasing powers. And defendants agreed to pay to plaintiff the residue of said purchase money, by the following instalments, *viz.*, 100,000*l.* on or before 15th April, 1826; 100,000*l.* on or before 15th October, 1826; 100,000*l.* on or before 15th April, 1827; and 75,000*l.* on or before 15th October, 1827; *with interest for the same sums, at the rate of 5*l.* per cent. per annum, to be reckoned from the 1st day of October, then next, until the day of payment thereof*, such interest to be paid by equal half yearly payments, and to be secured by the joint and several bond of defendants; and the said defendants agreed to purchase and pay for, at the time of taking possession, by a good bill at two months' date, the following property. (Then follows an enumeration of machinery, stock, &c.). And it was further agreed, that plaintiff should clear up and pay all taxes, &c., up to the time of giving possession, from which period defendants should be entitled to the rents and profits, and that plaintiff should, with all proper dispatch, complete the main railway, &c.; and that defendants should take to, and assume all contracts with the workmen, &c. Averment that the schedule, in said agreement mentioned, and thereunder written, was to the tenor and effect following, that is to say, that the property contracted to be sold by plaintiff to said defendant, was as follows, Corngreave's estate, consisting of, &c. As by the said agreement and schedule, reference being thereunto had, will amongst other things more fully and at large appear.

And that afterwards, to wit, on the 1st October, 1825, at, &c., by a certain other agreement, then and there made, by and between plaintiff of the one part, and defendants of the other part, after reciting said first mentioned agreement,

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and also reciting that said sum of 25,000*l.* in Exchequer bills, had been accordingly paid by defendants, and that several abstracts of title purporting to be the abstracts of title of plaintiff to the whole of the several freehold, leasehold, and other estates and property so contracted to be sold by him as aforesaid, had been delivered by him, or on his behalf, to the solicitors of defendants, and the several titles, as there respectively deduced, had undergone and were then still in a course of investigation; several points having been made thereon, and certain objections taken thereto, some whereof still remained to be satisfactorily explained or removed. And also reciting, that the time having arrived for the payment of the said sum of 200,000*l.*, and for the delivery of the said Exchequer bills to plaintiff; and had the title of plaintiff to the said premises, been then, as plaintiff at the time of entering into the said first mentioned agreement apprehended it would be, in a state fit for acceptance on the part of the said purchasers, the time would also have arrived for giving possession, if required, of the said several estates and property to the said purchasers; it had been agreed in consequence of the then present state of the title, that said first mentioned agreement should be varied, and otherwise added to in manner therein mentioned: and it was by the said agreement, bearing date 1st October, 1825, witnessed, that upon the delivery of the said Exchequer bills, and payment of the said sum of 200,000*l.* to plaintiff, in addition to any other payments required to be made by said first mentioned agreement, on delivery of possession, defendants should be let into, or might take the immediate possession for their own benefit, of so much of the said several estates, &c., as were then in the actual possession of plaintiff, and into the receipt of the rents and profits of the residue thereof, without such possession, nevertheless, when taken, being, or being deemed, or considered by plaintiff as an acceptance of the title, or as an abandonment, on the part of

defendants, of their right to have all valid objections to said title removed, and all defective evidence supplied by, or at the expense of plaintiff: and plaintiff did thereby further agree, that he, or his heirs, &c., should and would forthwith proceed, and within a reasonable time after the date thereof, remove all valid objections, made, or to be made to the said title, and complete any evidence which might be defective therein, and in all respects make the title as perfect as it should be within the power of plaintiff or his heirs, &c., to do. (Agreement by plaintiff to convey on or before 15th April, 1826, on the trusts mentioned in first agreement (a).) Provided, nevertheless, and it was thereby further agreed, by and between the said parties, that nothing contained therein was intended to disturb or alter the payment of the said three several instalments of 100,000*l.* each *or of the interest thereof*, on or before the days or times appointed, or mentioned in that behalf in the said first mentioned agreement, or the right of plaintiff to have the same respectively paid to him accordingly, *and also the interest of the said sum of 75,000*l.*, down to the 15th day of October, 1827, inclusively*; but it was thereby further agreed, that instead of the said instalment of 75,000*l.* being paid on the said 15th day of October, 1827, the said instalment of 75,000*l.* should be left upon the security of the said estates and property, at interest payable half yearly, at the rate of 4½ per cent. per annum, and to be then made by way of mortgage to plaintiff; and with a covenant to pay the same, as well principal as interest, and to continue for a period of fourteen years from the said 15th day of October, 1827. And also that if it should happen when the time would have arrived for payment of the said instalment of 75,000*l.*, according to the terms of the said first mentioned agreement, namely, the said 15th day of October, 1827, that there should be any valid objection or objections then existing to said title, either as to the whole, or as to any part of the premises

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therein comprised, or there should be then any defect of evidence in the said title unsupplied, or if any legal estate should be then outstanding, in trust for plaintiff, or his heirs, either by express declaration, or by construction of law, in all, or any of the premises so contracted to be sold, and not then gotten in, but which ought to have been gotten in by him or them for the benefit of the said contract; save and except, nevertheless, as to any defects in the title which were otherwise provided for by the said first mentioned agreement, or in the schedule thereto, then it was thereby further agreed, that so far as related to any and every such objection, evidence, or outstanding legal estate, except as last aforesaid, and which could or might, by or on the part of plaintiff, or his heirs, be, or which ought to have been by him or them previously removed, supplied, or gotten in by defendants, their heirs, executors, administrators, or assigns, or by their solicitors, and under their directions, at the costs, nevertheless, and charges of plaintiff, his heirs, executors, or administrators; and that so far as related to any and every such objection, evidence, or outstanding legal estate, which it should not be in the power of plaintiff, or his heirs, executors, &c., either by suit or otherwise, to remove, supply, or get in as aforesaid; the same should be waived by or on the part of the defendants, their heirs, &c. (Then follows a clause requiring the plaintiff, in every such case of objection, evidence, or legal estate, to execute a bond of indemnity against the consequence of such defect, &c., with a proviso that the instalment of 75,000*l.*, and the interest thereof, during the fourteen years, and the security agreed to be given for the same, should be held upon certain trusts by way of indemnity, by four trustees, to be appointed as therein mentioned). And it was thereby further agreed, that in case there should at any time thereafter, be any difference, controversy, question, or disagreement between the said parties, or their respective heirs, &c., touching or concerning said title, or the validity, or propriety of the

objections, or requisitions made, or to be made, concerning the same title, or any of them, or touching, or concerning what ought to be the amount of the sum or sums so to be appropriated or set apart and invested as a collateral security, and by way of indemnity, as aforesaid, not exceeding, nevertheless, said last mentioned sum of 75,000*l.*; or touching, or concerning the time, or respective times, if any, for which the same was, or were, or ought to be, or continue invested for the purposes of such indemnity, after said period of fourteen years; or touching the nomination of any or either of the said trustees; or touching the amount of penalty of each and every of such bond or bonds, or the wording of the same, or of the condition or conditions thereof; and whether the same should be confined to the defect or defects then ascertained, or should be made to extend further with respect to the same portion of title; or touching or concerning what should or should not be, or amount to, a breach or breaches of said bond or bonds, or of the condition or conditions thereof, or any of them, or touching, or concerning the nature and amount of the satisfaction which, from time to time, ought to be made upon each, and every, or any breach or breaches of said bond or bonds, or of the condition or conditions thereof, whether in the shape of damages or otherwise, or touching, or concerning the said agreement, bearing date, the 1st day of October, 1825; or the construction of any clause, matter, or thing therein contained, or any supposed rights arising thereout, or any thing to be done in pursuance thereof, then, and in every such case, the subject matter, or subject matters, for the time being, of each, and every such difference, controversy, question, or disagreement between said parties thereto, or their respective heirs, &c.; and particularly as to the amount of each such investment and the time of its continuance after said period of fourteen years, for the purpose of such indemnity, should be submitted, and the same was and were respectively referred, so far as the same would admit

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thereof, to the order or determination of *J. Bell, P. B. Brodie, G. Harrison, S. Duckworth, and W. H. Tinney*, or any two or more of them. (Order and determination made by any two of the referees to be conclusive, and parties to "concur in all acts necessary for that purpose, and also for the purpose of submitting all and every such difference, question, or disagreement to reference as aforesaid." Proviso as to mode of estimating damages in case of eviction, and for not suing upon matters so agreed to be referred, and for not disturbing first agreement, except where inconsistent with second). As by the last mentioned agreement, reference being thereunto had, will amongst other things, more fully and at large appear.

And, that afterwards, to wit, on the 4th November, 1825, at, &c., by a certain other agreement, then and there made and indorsed on said last mentioned agreement, between plaintiff of the one part, and defendants of the other part; after reciting that since the said agreement, bearing date, 1st October, 1825, was prepared and perfected ready for execution by said several parties, but before the execution of the same by them, it had for divers good causes been agreed to vary and alter same, and also said first mentioned agreement in manner thereafter mentioned, but not further or otherwise; it was witnessed and agreed, that defendants, their heirs, &c., should be, and they were thereby exonerated and discharged *from all and all manner of personal liability, to the payment of any sum or sums of money whatsoever, by reason or means of their having been parties to, and signed said first mentioned agreement, or from any act whatsoever, in any wise incidental thereto, or consequent thereon; save and except that they should be, and remain answerable for, and liable to the payment of the interest on the remaining instalments of the said purchase money, as in said first mentioned agreement expressed, so long as they remained in possession of the said hereditaments and premises, or any part thereof; and that plaintiff should be satisfied, as his only means of*

enforcing the payment of subsequent instalments of the purchase money mentioned in the said first mentioned agreement, with the security of the hereditaments specified in said first mentioned agreement, and which hereditaments were to be conveyed to trustees in manner in said agreement, bearing date 1st October, 1825, expressed; and with the usual powers or trusts for sale, for enabling the trustee or trustees for the time being, to sell and dispose of a competent part or parts of the same hereditaments, and thereby raise and pay such of the said instalments as from time to time should fall due, and from time to time, when as the same should fall due, with the respective interest then due in respect of the said purchase money, or any part thereof, and with all necessary powers and authorities to give discharges. (Proviso for giving notice to defendants six months before sale, and that plaintiff might be a purchaser). And it was thereby agreed, that the sum of 50,000*l.* only, was to be paid to plaintiff on the 15th day of April next, after the date thereof; the further sum of 50,000*l.*, by the said first mentioned agreement, provided to be paid on that day, having been agreed by and between the said parties thereto to be abated from the said purchase money therein mentioned. *And it was thereby lastly agreed by and between, &c., that the provision for reference to arbitration, contained in said agreement bearing date, 1st October, 1825, and said agreement therein also contained, for carrying same provision into effect, and for obeying every award and determination when made in pursuance thereof, should extend to said agreement, bearing date 4th November, 1825, and to every clause therein contained, in the same manner as if such or the like provision for reference to arbitration, and such or the like agreement for carrying the same into effect, and for obeying and observing the award or determination, awards or determinations to be made in pursuance thereof, had been therein repeated, omitting only all matters contained in the said memorandum of agreement bearing date 1st October, 1825,*

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at variance therewith, and including in lieu thereof, said agreement, bearing date 4th November, 1825, and had formed part thereof, and all clauses therein contained at variance therewith had been omitted. Proviso for making each submission to reference a rule of Court. As by the said agreement bearing date 4th November, 1825, will upon reference thereto more fully and at large appear. Mutual promises. Averment, that afterwards and after the making of the said several agreements, to wit, on, &c., at, &c., the said sum of 25,000*l.* so invested in Exchequer bills, as aforesaid, and placed by defendants in the hands of Messrs. *Hoare, Barnetts, and Company,* to the joint account of defendants and plaintiff, by way of deposit, as in the said first mentioned agreement mentioned, was duly paid over to plaintiff, and according to the tenor and effect of said several agreements in that behalf mentioned; and that afterwards, to wit, on &c., at, &c., the further sum of 200,000*l.*, other part of the said purchase money, in said first mentioned agreement mentioned, was also paid to plaintiff by said defendants, according to the stipulation in said first mentioned agreement in that behalf; and that upon the payment of said two several sums of 25,000*l.* and 200,000*l.*, defendants were let into full and complete possession of said several freehold and leasehold estates and other property, by said first mentioned agreement, contracted to be sold to defendants. By virtue whereof, defendants afterwards, to wit, on, &c., at, &c., entered into and upon all and singular said several freehold and leasehold estates and other property, by said first mentioned agreement contracted to be sold to defendants, with the appurtenances, and became, and were, and from thence, hitherto have been, and still are, in full and complete possession thereof. Averment of general performance on the part of plaintiff, and non-performance on the part of defendants. Averment, that defendants did not nor would pay to plaintiff the interest upon the residue of said purchase money, in

said several agreements mentioned, at the rate, &c., to be reckoned from, &c., until, &c., by the half yearly payments, and in manner, &c., or otherwise howsoever, but on the contrary thereof, although the sum of 325,000*l.* residue of said purchase money, in said several agreements mentioned, was at the time of making the said agreement last set forth, and still is due and unpaid, from defendants to plaintiff, and although defendants now are, and from the time of making said agreement last set forth, continually have been in the full and complete possession of the premises with the appurtenances, by said first mentioned agreement contracted to be sold to defendants as aforesaid, and in the receipt of the rents and profits thereof; and afterwards, to wit, on the 1st day of April, 1827, at, &c., a certain large sum of money, to wit, 16,250*l.* for one year's interest, at the rate of 5*l.* per cent. upon and in respect of the said sum of 325,000*l.*, so being the residue of the said purchase money so unpaid as aforesaid, ending on the day and year last aforesaid, became and was due, and still is in arrear and unpaid from defendants to plaintiff of which defendant afterwards, to wit, on the same day and year last aforesaid, at, &c., had notice. Nevertheless, defendants have not as yet paid the sum of 16,250*l.* or any part thereof to plaintiff, although often requested so to do, but have, and each of them hath hitherto altogether neglected and refused, and still do, and each of them doth neglect and refuse so to do, to wit, at, &c. The declaration contained a second special count upon which no point arose, and counts for interest, money lent, money had and received, and upon an account stated. Plea, non-assumpsit. At the trial before *Littledale*, J., at the last Stafford assizes (a), it appeared that at the time of the transactions mentioned in the declaration, the plaintiff was the owner of some extensive iron works, called the

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(a) Counsel for the plaintiff, *Scarlett*, A. G., *Jervis*, *Russell*, Serjt., and *Whateley*; for the defendants, *Campbell*, *Ludlow*, Serjt., and *R. V. Richards*.

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Corngreave's Works, the Dudley Works, and the Netherton Works, in the county of Stafford. The defendants were the three managing directors of a company established in London, for the working of iron mines, and the manufacturing of iron, under the name of The British Iron Company. The defendants being authorized by their co-directors to treat for the purchase of the plaintiff's iron mines, on the 10th June, 1825, entered into the first contract mentioned in the declaration (*a*). By the terms of this contract, the defendants were to take possession 1st October, 1825; but it being found impossible to complete the title by that time, it was arranged that the purchasers should be let into possession; and the second contract declared (*b*) on was entered into. Some misstatements in the information on which the purchase had proceeded having been discovered, an abatement of 50,000*l.* was agreed upon; and on the 3d November, the plaintiff executed the conveyance to trustees according to agreement (*c*), and the third contract (*d*), mentioned in the declaration was entered into. Upon this contract being executed, 200,000*l.* was paid, and possession was given to the Company. A bill was afterwards filed in the Exchequer to annul the contracts, on allegations of fraud and concealment; and a cross bill was filed by *Attwood* to compel a specific performance. On the part of the defendants, it was contended that they had contracted merely as agents for the British Iron Company, and that the plaintiff being a shareholder, it was not competent to him to sue parties who had entered into the engagement for the benefit of all the shareholders (*e*). In support of the defendants' case, the following letters, written by plaintiff to defendant *Small*, were read.

(*a*) *Ante*, 246.

(*b*) *Ante*, 247.

(*c*) *Ante*, 246, (*c*).

(*d*) *Ante*, 252.

(*e*) See *Milburn v. Codd*, *ante*, 236, 239, note (*c*).

"Corngreaves House, near Birmingham,
August 15th, 1825.

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Dear Sir,

I understand from Mr. *James*, who has just arrived at the works, that Mr. *Philip Taylor*, informs him *the gentlemen forming the acting committee of the British Iron Company*, deem it absolutely necessary to make an immediate report of the purchases *they* have made. When the treaty was entered into with me, it was distinctly understood between the parties, for reasons then given, that the same prudence and discretion should be observed in this business *as between private individuals*, and that the affairs should not be permitted publicly to transpire until the conveyances were signed and possession given up, as nothing is yet known in the country. I do, therefore, hope and trust that things may be permitted to remain as they are at present, and that no steps will be taken to make the transaction public until the whole is finally settled, and you have possession of the property, which, if proper diligence is used in drawing up the writings, may certainly now be done in a very short time, when it will be a matter of little moment to me what publicity is then given; but before that time, as it appears to me, it would be premature to do so, contrary to your interest, and very much against my feelings and the implied understanding between us."

"Birmingham, Aug. 18th, 1825.

Dear Sir,

I am favoured with your letter of the 16th instant, and I assure you, I scarcely know how to express my feelings and the disappointment I am under at the information therein conveyed to me, as well as by Mr. *Philip Taylor*, whom I have seen this morning. I was in hopes *the printing of the report of your purchases* would have been delayed until the title to the property had been

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gone through and approved of by you ; for if any thing should arise to prevent the purchase from being finally completed, according to the terms of the agreement (but of which I have nevertheless little doubt), it will place me in the most disagreeable and vexatious situation. But since the report is now printed, I do hope the circulation of it will be delayed for a few days, until the title is gone through by your attorneys, and accepted by you, and that nothing will be published in the newspapers at present, *or otherwise transpire from the directors*, beyond what is absolutely necessary until the affair is brought nearer to a termination. Trusting entirely to your prudence and discretion." &c.

" Corngreaves House, Aug. 26, 1825.

Dear Sir,

I have received your letter of the 23d, containing the Report of the *purchases of the British Iron Company*. I could much have wished every thing had remained quiet until the affair had been brought nearer to a termination ; but the account of *your purchases* is spread in all directions."

" Corngreaves House, Sept. 14, 1825.

Dear Sir,

I am duly favoured with your letter of the 12th instant, informing me that Mr. *Scott* had, by your kind directions, purchased 50 shares in the British Iron Company for my account, being in part of 200 shares which Mr. *James* had requested you to buy. You will oblige me for the present by permitting them to stand in the name of Mr. *Fowles*, in trust for me, and charge my account with the amount of them. Or if you think it would be more regular, I will send you up checks for the shares as they are purchased, and when I come up to town towards the end of the month, I will finally arrange with regard to them."

"Corngreaves House, Sept. 14, 1825.

Dear Sir,

After I wrote to you on the 14th, I received your favour of the 13th instant. I am just returned from a journey, and have only time to write a few lines to save the post. I observe that Mr. Scott has purchased 150 more shares, which you will please dispose of in the same way as the former 50. I fear he has been a little too hasty in his purchases, as there was no hurry, and it might have been better to have taken the shares more gradually; for if the advanced price should cause many more shares to be brought to market, they may again go back in price, and it may then look like an ineffectual attempt to raise them. I will wait a few days before I determine upon taking any more shares, as I expect I may have occasion to come up to town shortly."

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Also the following letter from the plaintiff to the three defendants.

"Fladong's Hotel, Oxford-street.

8th April, 1826.

I enclose you a check for 1000*l.* the amount of the sixth call on my shares in the British Iron Company, which you say was due on the 20th February last.

I am, &c.

JOHN ATTWOOD.

Messrs. *Small, Shears, and Tayler,*
London."

It was also objected on the part of the defendant, that the last agreement must be considered as incorporating the clause for submitting disputes to arbitration, contained in the second agreement, which is expressly referred to and adopted in the third, and there applied to a new subject matter. Upon this view of the third agreement, it would

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contain more than 1080 words, and the 11. agreement stamp imposed upon it, would be insufficient. The learned Judge overruled this objection, and left the following questions to the jury. 1st. Whether there was a company called the British Iron Company, and when? 2d. Whether the defendants were shareholders, and when? 3d. Whether the plaintiff was a shareholder, and when? 4th. Whether the contracts were made with the defendants, as trustees for the British Iron Company? 5th. Whether the plaintiff was aware, at the time of the contract, that the defendants were acting as trustees for the British Iron Company.

The jury found that there was a company called the British Iron Company in September, 1825, and not earlier; that the defendants were not shareholders; that the plaintiff was a shareholder in September, 1825; that the plaintiff sold to the defendants themselves, on their own account and liability, and not on behalf of the company, and that they bought on their own account. The fifth question was disposed of by the answer to the fourth.

Verdict for the plaintiff, damages 16,250*l*.

Campbell now moved for a rule to shew cause why a nonsuit should not be entered, or a new trial granted, upon the want of a sufficient stamp, and that the verdict was contrary to the evidence. [Lord *Tenterden*, C. J. *Is the point reserved as to the stamp?*] It was not. *But in Montague v. Benedict (a), where the question was whether goods furnished to the wife were necessaries, the Court directed a nonsuit to be entered, although it does not appear that the point was saved at the trial. [Lord*

(a) 3 B. & C. 631; same case, by the name of *Montague v. Baron*, 5 D. & R. 532, the defendant's name in both reports being only imaginary. In the report of the argument in *Banc*, the circumstance of leave being given at the trial to move for a nonsuit is not adverted to; but the point was in fact saved.

Tenterden, C. J. You must confine your application to a new trial (a).] By the first agreement of the 10th June, 1825, the plaintiff agreed to sell iron mines for 600,000*l.*, and 25,000*l.* was paid by way of deposit. Upon an objection to the title, the second agreement of the 1st October was made, but possession was not delivered on the 1st October, nor the 200,000*l.* paid; and it was agreed, that both the payment and the delivery of the possession should be postponed. A very peculiar proviso (b) was introduced into this contract, for a reference to certain barristers. On the 4th November, the property was conveyed to trustees for

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(a) Where a legal objection is taken at the trial, and overruled by the Judge, without reserving the point, and the Court are afterwards of opinion, that the objection was a good ground of nonsuit, they will grant a new trial only, and will not permit a nonsuit to be entered; *Minchin v. Clement*, 1 B. & A. 252. In that case Lord *Ellenborough* says, "It is in the plaintiff's option to be nonsuited or not, and if at the trial he had refused to be nonsuited, and the Judge had then directed the jury to find a verdict against him, it was competent to the plaintiff to have tendered a bill of exceptions, of which advantage he would be deprived if the Court were now to direct a nonsuit to be entered." Hence it would seem to follow, that if the plaintiff is dissatisfied with the leave reserved, he may insist upon his case going absolutely to the jury. In *Hill v. Thompson*, 8 Taunton, 375, 2 J. B. Moore, 424, a nonsuit was directed to be entered, although no specific leave had been reserved to move to enter a nonsuit; but there the Court held, that the point

as to a nonsuit was involved in the reservation of the general consideration of law (2 J. B. Moore, 459); and the objection was not taken till after the Court had made the rule for entering a nonsuit absolute. And see *Gould v. Robson*, 8 East, 580; *Clarke v. Swift*, 2 J. & Y. In *Gates v. Ryan*, 2 Chitt. Rep. 271, it is reported to have been said, that if the Judge refuses leave at the trial, because he thinks it will be unnecessary, he will put the party in the same situation as if leave had been given at the trial. This would, however, as effectually oust the plaintiff of his right to discuss the propriety of the Judge's opinion, as if the Court should direct a nonsuit to be entered where no leave had been reserved. Where, however, a verdict has been found for the defendant, there is no objection in point of law, to the setting aside that verdict, and ordering a nonsuit to be entered for the benefit of the plaintiff, in order that he may not be precluded by the verdict from discussing the question in a second action; *Lee v. Shore*, 2 D. & R. 198, 1 B. & C. 94, S. C. (b) *Ante*, 251, 252.

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the security of the plaintiff, and the third agreement was entered into. That agreement, it was contended on the part of the defendants, required a stamp of 1*l.* 10*s.* The necessity of a stamp of that amount (*a*), depends upon the question, whether the clause referred to, is considered as forming part of the last agreement. The words of reference are, "that the provision for a reference to arbitration, contained in the said agreement, bearing date the 1st day of October, 1825, and the said agreement therein also contained for carrying the said provision into effect, and for obeying every award and determination, when made in pursuance thereof, shall extend to this present agreement, and to every clause therein contained, in the same manner as if such or the like provision for reference to arbitration, and such or the like agreements for carrying the same into effect, and for obeying and observing the award or determination, awards or determinations, to be made in pursuance thereof, had been repeated." The words of the statute are, "indorsed thereon, or annexed thereto." It is a well-known rule of law, that *verba relata, inesse videntur* (*b*). The clause of submission must be therefore considered to be inserted in the last agreement. [Lord Tenterden, C. J. There was a stamp on the agreement of the 1st October]. That stamp was *functus officio*. The agreement of the 4th November, provided for the submission to arbitration of matters totally different from those contained in the

(*a*) 55 Geo. 3, c. 184, Schedule part I. "Agreement, or any minute, or memorandum of an agreement made in England under hand only, where the matter thereof shall be of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties, from its being a written instrument, together with every schedule, receipt, or other matter, put or in-

dorsed thereon, or annexed thereto.

When the same shall not contain more than 1080 words (being the amount of fifteen common law folios, or sheets of 72 words each). £ 1 0 0

And when the same shall contain more than 1080 words

£ 1 15 0

(*b*) As to the application of this maxim, see Co. Litt. 9 b, 10 a; 1 Tho. Co. Litt. 500; 3 Bac. Abr. 534.

former agreements. In *Lake v. Ashwell* (a), it was held, that a schedule of goods referred to in a deed to which it was annexed, must have the proper deed stamp, as part of the deed. There the schedule was annexed; but whether it was annexed or not, it ought to be counted. In that case, Lord *Ellenborough* says, "if this were not so, the revenue would be liable to great evasion; for then, an instrument requiring a certain stamp in proportion to the number of words, would only contain a few words of reference to a schedule, by which every thing would be conveyed in fraud of the revenue." Here the plaintiff might assign a breach of the last agreement, in the non-performance of any of the stipulations expressed in the clause of reference set out in the second agreement. So, upon the expiration of a long lease, the parties might enter into an agreement in writing to continue the tenancy upon the terms of that lease; or two persons might enter into partnership (b) according to the terms of a precedent, in the forms published by Mr. A., vol. 3. [*Bayley*, J. There are persons interested in preventing that. Lord *Tenterden*, C. J. Whether any mode may be found of evading the law, I cannot say. We must take the law as it is]. The mines were sold to the defendants as agents for the British Iron Company, in which, the plaintiff was a shareholder. [Lord *Tenterden*, C. J. Does it appear on the face of the agreements that the defendants contracted as agents]? It does not. But that was shewn as matter of fact, though the jury found that

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(a) 3 East, 325.

(b) Q^u: whether an agreement for a partnership is necessarily "an agreement where the matter thereof is of the value of 20*l*. or upwards." See the judgment of *Bayley*, J., in *Orford v. Cole*, 2 Stark. N. P. C. 351—3; where his Lordship said, that "the argument on the part of the defendant, had proceeded on the supposition that

the case, where the subject matter of the contract is not of the value of 20*l*., was an *exception* to the general clause; that it was not an exception, but a substantive part of the enactment, which was not to operate at all unless the matter of the agreement should be of the value of 20*l*. or upwards; that this supposed that the value of the contract was *measurable*."

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the plaintiff sold to the defendants on their own liability. As it appears from the plaintiff's own letters, that he had purchased shares in the concern, he was interested in the profits and loss. [Lord *Tenterden*, C. J. There was no evidence that the defendants were partners. *Bayley*, J. The jury found that the *plaintiff* was a shareholder]. If he contracted with them as agents for the Company, the action will not lie.

Cur. adv. vult.

LORD TENTERDEN, C. J.—We have considered this case, and are of opinion, that there ought not to be a new trial. In the contracts, there is nothing to shew that the defendants were not dealing for themselves. The last agreement contains this special clause, “ save and except that they shall remain liable for the payment of interest.” This plainly shews that they contracted in their own right. The plaintiff gave up the personal responsibility of the defendants for the 600,000*l.*; but so late as November, the defendants considered themselves personally liable. I can by no means infer from the letters, that the defendants contracted for the British Iron Company. I should infer that they contracted with reference to a company intended to be formed. The plaintiff afterwards became a shareholder. It does not appear when he became so, or what right he acquired. He could not acquire an interest in land by merely becoming a shareholder (*a*). His interest accrued subsequently to the original contract, and collaterally to the last contract.

BAYLEY, J.—The plaintiff was the proprietor of the estate which the defendants contracted to buy. There is nothing to shew that the defendants did not contract on their own account. It is objected, that the plaintiff is a proprietor of 200 shares. The defendants, out of an estate

(a) See *Vice v. Lady Anson*, *ante*, 113.

of their own, were to give a certain interest to sub-purchasers. There was no evidence to shew that the plaintiff was to be a contributor to this purchase money.

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HOLBOYD, J.—It was entirely collateral.

LITTLEDALE, J., concurred.

Rule refused (a).

(a) See *Vice v. Lady Anson*, ante, 113; *Milburn v. Codd*, ante, 226.

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CASE, for a false return of *nulla bona* to a writ of *feri facias*, whereby the sheriff of Sussex was commanded to levy 200*l.* debt, and 65*s.* damages, recovered by plaintiff against *John Stone Lundie*. The first count charged that defendant, as sheriff, had seized goods of *Lundie* to the value indorsed on the writ. The second stated, that *Lundie* had goods within the bailiwick, of which defendant might have levied the amount. Plea, not guilty. At the trial before *Littledale*, J., at the last Spring assizes for the county of Sussex (a), it appeared that the judgment against *Lundie* had been entered up on a warrant of attorney, signed *J. S. Lundie*; but in the body of which he was named, as in the judgment, and *fi. fa.*, *John Stone Lundie*.

The sheriff had seized goods under the *feri facias* to the amount indorsed, viz., 178*l.* 17*s.*, and had retained the possession for eighteen days, at the expiration of which, he quitted possession in consequence of the plaintiff's refusing to indemnify him against a claim set up by the trustees of Mrs. *Lundie's* marriage settlement, which claim was not established at the trial. It ap-

A., by signing his initials, executes a warrant of attorney, wherein he is misnamed. Judgment is signed, and a *fi. fa.* issued in the wrong name. The sheriff seizes, but afterwards abandons the possession, in consequence of the plaintiff's refusing to indemnify him against a claim of property set up by a stranger:—Held, that the sheriff cannot return *nulla bona*.

(a) Counsel for the plaintiff, for the defendant, *Taddy*, Serjt., *Marryat*, *Gurney*, and *Comyn*; and *Bolland*.

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peared, however, that the real name of the original defendant was not *John Stone Lundie*, but *John Stow Lundie*. It was objected that the allegation, that the defendant had seized, or might have seized, the goods of *John Stone Lundie*, was not proved, inasmuch as it did not appear that any person of that name had goods within the bailiwick. The learned Judge overruled the objection, and a verdict was found for the plaintiff.

In last Easter term, *Bolland* obtained a rule to shew cause, why the verdict should not be set aside, and a new trial had; and he referred to *Morgans v. Bridges (a)*.

Marryat, Gurney, and Comyn, now shewed cause. After judgment the party can take no such objection. This distinction is settled by many authorities. In *Crawford v. Satchwell (b)*, the plaintiff brought trespass and false imprisonment, by the christian name of *Archibald*. The defendant justified under a *capias ad satisfaciendum* upon a judgment against *Arthur*, and averred that the plaintiff in this action was the same person who was sued by the name of *Arthur*. And on demurrer, the Court held it a good plea, the defendant having missed his time for taking advantage of the misnomer, which should have been by pleading it in the first action; saying that in the case of a bond given in a wrong name, the party must be sued by that wrong name, and the execution must pursue it. So, in *Smith v. Patten (c)*, the Court refused to set aside proceedings after interlocutory judgments, and a writ of inquiry, although the defendant had remained wholly passive during the proceedings. Here, though the original defendant did not write *Stone* at the bottom of the warrant of attorney, he adopted that name by executing the instrument. In *Morgans v. Bridges*, one brother was taken under a *ca. sa.* by the

(a) 1 B. & A. 647.

(c) 6 Taunt. 115.

(b) 2 Stra. 1218.

name of the other; and though it was stated to the sheriff that the party taken was the real debtor, the sheriff had no means of ascertaining that fact, and the plaintiff refused to indemnify him. Here no such point was taken by the sheriff; he entered and afterwards abandoned the possession he had taken, upon a totally distinct ground. In *Gould v. Barnes* (a), it was held, that if a person enter into a bond by a wrong christian name, he should be sued on the bond by such name: and that a declaration against him by his right name, stating that he executed the bond by the wrong name, is bad. That case shews clearly that neither the defendant in the original action, nor the sheriff, can take the objection. The writ necessarily followed the judgment; it would have been bad if it had been against *John Stow Lundie*, the name in the judgment being *Stone*. They also referred to *Shadgett v. Clipson* (b); and *Cole v. Hindson* (c), which were cases upon mesne process, and turned upon the form of pleading. Here the defendant was estopped, and therefore the sheriff was estopped.

Taddy, Serjt., and *Bolland*, *contrà*.—The question is, not whether the sheriff might have executed the writ, but whether he was bound so to do. He has not executed the writ. [*Bayley*, J. You have begun to execute, but you refuse to proceed upon a different ground]. The difficulty would be the same with a name wholly different. The return made by the sheriff is true, and there were no goods in his bailiwick of the person described in the writ of *fieri facias*; if a defendant suffers judgment by a wrong name, how is the sheriff to know it? [*Lord Tenterden*, C. J. Here the sheriff did act, and retained possession under the writ for eighteen days. Could *Lundie* have maintained an action against the sheriff for that entry? *Bayley*, J. It might have been different if the

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(a) 3 Taunt. 504. And see
Com. Dig. Fait, E. 3.

(b) 8 East, 328.
(c) 6 T. R. 234.

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sheriff had refused to take the goods of *John Stow Lundie* without an indemnity]. The sheriff would have to prove identity. [*Bayley, J.* That is so in every case]. In *Morgans v. Bridges (a)*, the question was, whether the sheriff was justified in letting the defendant go, after he had taken him, and the Court held that the sheriff was at liberty to take that course. [*Bayley, J.* There the sheriff was told that he had taken the wrong man, and the plaintiff refused to indemnify him. In *Cole v. Hindson (b)*, the distinction was taken between an arrest upon mesne process, when the defendant was not too late to plead in abatement. The sheriff is protected in the one case, and not in the other.

LORD TENTERDEN, C. J.—The distinction between mesne process and process of execution, is decisive of this case. The particular facts of this case are as strong against the sheriff as can be. He should have taken his stand at first, and have examined whether the judgment was in the same name; because if the judgment was in the same name, the execution was regular.

BAYLEY, J.—Why should the sheriff be allowed to take the objection where the party himself is estopped? In every case the sheriff is bound to ascertain whether the party whose person or goods he takes, is the party against whom judgment was given.

HOLBOYD, J., and LITTLEDALE, J., concurred.

Rule discharged (c).

(a) 1 B. & A. 647.

(b) 6 T. R. 234.

(c) And see Mich. 27 E. 3, fo. 12, pl. 48; *Julian Goddard's* case, 1 Roll. Abr. 869, l. 50, 10 Vin. Abr. 448, pl. 13; S. C. by the name of *Doyley v. White*, Cro. Jac. 323; *Rock v. Leighton*, 1

Salk. 310, 4th point; *Hyckman v. William Shotbolt*, alias dict. *John Shotbolt*, Dyer, 279, b.; *Greenslade v. Rotheroe*, 2 N. R. 132; *Attorney-General v. Kelsey*, 1 Price, 391; *Scandover v. Warne*, 2 Campb. 270; *Wilks v. Lorck*, 2 Taunt. 399.

DAME ANN FREDERICA ELIZABETH LE FLEMING
v. SIMPSON.

TROVER, for oak trees. Plea, not guilty. At the trial before *Hullock*, B., at the last Spring assizes for the county of Westmoreland (*a*), it appeared that plaintiff was lady of the manor of Rydal in that county, and that defendant, who in right of his wife (*b*), was a customary freeholder (*c*) of the manor of Rydal, had applied to the steward of the manor, to set him out timber for the purpose of erecting a new barn upon his tenement. The steward refused to do this, alleging, that it was not the custom of the manor, for the customary freeholder to have timber set out for such purpose, but only for repairing old buildings, and other necessary reparations;

Where, upon the plaintiff's evidence, the judge intimates a strong opinion in favour of the defendant, upon a point decisive of the cause, and in consequence of such intimation, the defendant's counsel omits to call evidence in support of a different point intended to be raised by way of defence, the Court will direct a new trial only, and will not order a verdict to be entered for the plaintiff.

(*a*) Counsel for the plaintiff, *Courtney* and *Aglionby*; for the defendant, *Blackburne*, and *T. Clarkson*.

(*b*) The wife had been admitted as *devisee* of her father, the preceding customary tenant.

(*c*) It does not distinctly appear from the evidence in this cause whether the customary estate in question is *held of* the manor, in which case the freehold is in the *tenant*, and the presumption as to the right of the timber, would be in his favour; or whether, as is usually the case with respect to the customary freeholds in the northern border manors, it is *within and parcel of* the manor, in which case the freehold is in the *lord*, and the presumption as to the right of the timber, would be in the lord's favour. As to the leading distinctions between these two classes of customary freeholds, see *Manning's Exch. Prac.*, 2nd ed. Revenue Branch, 42, 359. See also, 12 Lib. Ass. fo. 35, pl. 18;

Mich. 14 H. 4, fo. 1, pl. 2; *Fitz. Auncien Demesne*, pl. 33; *Coke*, Copyholder, 57; Co. Litt. 59 b; Sir Fra. Moore, 588, pl. 796; *Crowther v. Oldfield*, 1 Lutw. 125, 2 Lord Raym. 1225, 1 Salk. 364; *Oliver v. Taylor*, 1 Atk. 474; *Glover v. Cope*, 1 Shower, 284; *Fenn v. Marriott*, Willes, 430; *Duke of Somerset v. France*, 1 Stra. 654; *Fortescue*, 41; *Hussey v. Grills*, Ambler, 301; *Stephenson v. Hill*, 3 Burr. 1273; *Vaughan v. Atkins*, 5 Burr. 2766; *Burrell v. Dodd*, 3 B. & P. 378; *Doe v. Huntingdon*, 4 East, 271; *Roe v. Vernon*, 5 East, 51, 1 Smith, 318; *Doe v. Danvers*, 7 East, 299; *Brown v. Rawlins*, *ib.* 409; *Roe v. Briggs*, 16 East, 406; *Doe v. Jackson*, 2 D. & R. 514, 1 B. & C. 448; *Gilb. Tenures*, 312, 313; *Harg. Co. Litt.* 59 b. note, 400; 1 Tho. Co. Litt. 658, note (E); 2 Tho. C. L. 624. And see the pleadings in 9 Wentw. 124, (*Manor of Natland* in Kirby Kendall).

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upon which the defendant cut down three oak trees upon his own tenement, asserting that he had a right to have timber for the purpose of erecting a new barn; and if the steward would not order timber to be set out for this purpose, he would take it himself, as he had a right. It appeared also in evidence, that the defendant had carried away the oak trees, with the intention of using them in the erection of a new barn, which did not appear to have been completed. The plaintiff endeavoured to set up a custom in the manor, for the lord to enter upon the tenements of the customary freeholders, and to cut and take timber for his own use, at his will and pleasure. And she also adduced some evidence to shew, that according to the custom of the manor, the customary freeholder had no right to have timber set out for the purpose of erecting new buildings, but only for the repair of old buildings. In an early stage of the trial of the cause, the learned Judge threw out a hint, that the only question was, whether the lord had, by the custom of the manor, an absolute right to enter upon the tenements, and to cut down timber, and dispose of it for his own use; and he directed the jury, that such was the sole point for their consideration, and that the question whether the defendant had a right to timber for the purpose of repairing old buildings or erecting new buildings, was no part of the case for their consideration. Before the learned Judge had summed up, *Courtney*, on behalf of the plaintiff, elected to be nonsuited. His Lordship, however, wished to have the finding of the jury upon the point; and they found, that by the custom of the manor, the lord had no right to enter upon the customary tenements, and cut and take timber for his own use. The plaintiff was to be considered as nonsuited, with liberty to move to set aside the nonsuit, and to enter a verdict for the amount of the value of the trees.

In Easter term, *Scarlett*, A. G., obtained a rule to shew cause why the nonsuit should not be set aside,

and a verdict entered for the plaintiff, or a new trial granted.

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Blackburne, and *T. Clarkson*, now appeared to shew cause against the rule, which was supported by *Scarlett*, A. G., *Courtney*, and *Aglionby*; the learned Baron, however, reported, that he considered that he had misdirected the jury, and that it appeared to him, that it was proved at the trial, that the defendant had no right by custom, to timber for *erecting new* buildings, but only for *repairing old* buildings. Upon hearing the report read, the counsel for the defendant admitted, that they could not resist that part of the rule which related to a new trial; but they contended, that a verdict could not be entered for the plaintiff. The learned Baron being of opinion, very early in the course of the trial, that the only question *was*, whether the plaintiff had, by the custom of the manor, a right to enter upon the tenements, and cut timber for her own use, it became unnecessary and irrelevant for the defendant to go into the question, whether he had a right by custom to take timber for repairing old buildings, or erecting new ones; and therefore the counsel for the defendant, in his address to the jury, had confined himself solely to the other question, although he had 'a case for the consideration of the jury, upon the right of the defendant by custom, to have timber for the purpose to which the trees cut down by the defendant were intended to be applied.

Lord TENTERDEN, C. J.—If the counsel for the defendant states that he was instructed to prove the right of the tenant, we take that from him, and grant a new trial only.

The other Judges concurring.

Rule absolute for new trial.

The KING v. The JUSTICES of SOMERSETSHIRE.

The presentment of a constable for any offence, whether at the assizes or quarter sessions, must be made upon oath, before the grand jury.

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LUDLOW, Serjeant, had obtained a rule calling on the defendants to shew cause why a presentment made by one *Richard Hooper*, constable of the Hundred of *Whitley*, in the county of Somerset, of the Company of Proprietors of the Bridgwater and Taunton Canal, for a nuisance, and which had been removed into this Court by certiorari, should not be quashed, upon the ground that the constable making the presentment did not go before the grand jury, and was not sworn or examined by them.

Rogers shewed cause, upon an affidavit stating the following facts. The usual practice with respect to presentments made by constables, which has prevailed for many years at the Somersetshire quarter sessions, and at the assizes on the Western and Norfolk Circuits, is for the constables of the several hundreds to be sworn in open court, generally, to present all nuisances, &c., within their respective hundreds. The constable who has any offence to present there, acquaints the clerk of the indictments with the nature of that offence, who thereupon draws up the form of a presentment, which the constable signs. The clerk of the indictments, afterwards, draws out another presentment, containing, in substance, the original presentment signed by the constable, to which he annexes the original presentment, and upon which he indorses a memorandum that the proceeding is upon the presentment of the constable who made it. The two presentments, thus annexed to each other, are then filed with the clerk of the peace, or the clerk of assize, without being laid before the grand jury, or returned by them, and without the constable who made the presentment, going before the grand jury, or being sworn, or examined by them. This mode was adopted in the present case, and the presentment last drawn was in the

common form of presentments by the grand jury, commencing with the words, "the jurors for our lord the King upon their oath present," &c. Upon this affidavit the presentment in this case ought to be supported, for it is clear that it has been made according to the general and ordinary practice which has prevailed throughout the county for many years, which is harmless and unobjectionable in itself; and which the Court, therefore, will not disturb. [Lord Tenterden, C. J. This is, in effect, an indictment. How can there be an indictment without the intervention of a grand jury]? The practice is authorized by the common law, under which nuisances were presentable at the torne or leet; for Lord Coke says, "the law, for this common nuisance," that is, a nuisance in a common or public way, "hath provided an apt remedy, and that is, by presentment in the leet, or in the torne" (a); and *Hawkins* lays it down that constables may still present all offences inquirable of in the torne or leet (b). The torne and leet were originally courts of high criminal jurisdiction, exercising large powers and extensive authority; and though much of the business of these courts has been transferred to the assizes and the quarter sessions by the statute 1 *Edward 4*, c. 2, still a presentment like the present might, even at the present day, be made at the torne, and the case disposed of at the sessions. There are various instances in which justices of the peace are authorized to make presentments upon their own view or knowledge; and such presentments have all the force and validity of indictments found by grand juries. The statute 17 *Edward 4*, which was passed for regulating the making of tiles, appoints certain persons to act as searchers, and empowers them to make presentment of defaults at the quarter sessions, declaring that such presentments "shall be as effectual in the law as the presentment of twelve men;" and *Lambard* in his *Eirenarcha*, after alluding to

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(a) Co. Litt. 56, a.

(b) Hawk. lib. 2; s. 34.

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these powers of justices of peace and searchers, says, "and some such like strength, as I think, is the presentment of constables, concerning sundry points contained in the statute of Winton" (a). So, *Fitzherbert*, in his treatise, *Sur l'Office de Justice de Peace* (b), observes, that it seems the presentment of a constable at sessions was formerly equivalent to an indictment. There is also an anonymous case in *Ventris* (c), which seems to support the position, that a constable making a presentment need not go before the grand jury, where the Court said, that constables were to present on their own knowledge, but were not *obliged* to present, unless the witnesses, upon whose testimony they are required to do so, have been carried before the grand jury (d).

Ludlow, Serjeant, *contra*, was stopped by the Court.

LORD TENTERDEN, C. J.—This presentment is clearly bad, and must be quashed. There is no doubt that a constable may present upon his own knowledge; but still his presentment must be made upon oath. If he is able to present upon his own knowledge, he is equally able to go before the grand jury, and make his presentment upon oath. I am decidedly of opinion that every such presentment ought to be made upon oath before the grand jury, and to be regularly returned by them, in order to its having any force or validity. Here is an indictment found not upon oath, a proceeding which we

(a) Lambard, lib. 4, c. 6, p. 508.

(b) p. 125.

(c) 1 Vent. 336.

(d) *Ritton*, in his *Office of Constable*, p. 62, says, "the constable should present all offences within his own knowledge, which concern the peace, as defaults of watching, disorderly houses, affrays, &c., at the leet, tourn, or quarter sessions."

And such presentment is as available as one made by twelve men.

Dalton, J. P., 474, Fitz J. P. 6.

But he is not obliged to present a highway, sworn before him by two witnesses to be out of repair; even though demanded so to do by the quarter sessions, and may tell them plainly that he will not present it. 1 Vent. 336. See also.

ought not under any circumstances to support. It states, in terms, that the grand jury, "upon their oath present," though it has never been before the grand jury; so that the very first and most material averment in it, is palpably and absolutely false. No man ought to be put upon his trial except upon an indictment found on oath. I am sorry to hear that the custom as set out in the affidavit has prevailed so long; it is clearly unjust and illegal, and must be discontinued.

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The other Judges concurred.

Rule absolute for quashing the presentment (a).

(a) And see *Res v. Fylingdales*, ante, 176.

CADDY, an infant, by her next friend, v. BARLOW.

THIS was an action for a malicious prosecution, tried before *Vaughan*, B., at the last assizes for the county of Stafford (b), when a verdict was found for the plaintiff, damages 100*l.*, under the following circumstances. The plaintiff and her brother, both children of tender age, had been apprehended and tried at the Staffordshire quarter sessions, at the instance of the defendant, on a charge of felony. They were acquitted, and a copy of the indictment was then applied for on behalf of the plaintiff's brother only, and granted. Afterwards a rule nisi for a criminal information against the defendant was obtained, upon the same grounds that formed the present cause of action, which was, after a full discussion of the

In an action by A. for the malicious prosecution by C. of an indictment against A. & B., evidence of the misconduct of C. towards B., after his apprehension, tending to shew the bad motives of C. is admissible. A copy of the indictment though granted to B. only, is also admissible; and the Court will not entertain the

(b) Counsel for the plaintiff, defendant, *Telford*,
Gampbell and *Whateley*; for the 1 B. & P. 191.

question of its having been fraudulently obtained. A rule for a criminal information obtained by A., and made absolute, is no bar to such action; nor will a new trial be granted on the ground of excessive damages.

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case, made absolute. No information, however, was filed, but the present action was brought. Evidence was offered at the trial, of the defendant's having used improper violence and threats to the plaintiff's brother, while they were both in custody, but in the absence of the plaintiff herself, with a view to induce him to make a criminal charge against their father. This evidence was objected to by the defendant's counsel, but was received by the learned Judge. It was also objected that the copy of the indictment in the prosecution against the two children, having been applied for, and obtained, on behalf of the brother only, was not admissible as evidence in support of an action at the suit of the sister only. This objection the learned Judge over-ruled. It was further objected, that a rule for a criminal information against the defendant having been obtained, at the instance of the plaintiff, for the same cause, her right of civil remedy had been waived, and the action was not maintainable. This objection also the learned Judge over-ruled.

Talfourd now moved for a rule *nisi*, in the alternative, either for a new trial, or for a stay of proceedings, upon affidavits setting forth the above facts, renewing all the objections taken at the trial, and upon the further ground that the damages were excessive. He cited *Rex v. Fielding (a)*, as decisive to shew that the action could not be maintained until the criminal proceedings were entirely abandoned. He contended, upon general principles, that evidence of the defendant's misconduct towards the brother, was not admissible to increase the damages in an action brought by the sister. He insisted that the copy of the indictment having been granted to the brother, could not be used by the sister; for to apply it to such a purpose was in effect to practice a gross fraud upon the court of quarter sessions. And he submitted that, under all the circumstances, the damages were so

(a) 2 Burr. 654; 2 Lord Kenyon, 386, S. C.

excessive, that the case ought to undergo revision by another jury.

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Lord TENTERDEN, C. J.—I cannot say that I think the evidence of the ill-treatment of the brother, by the defendant, after the apprehension of the two children, was improperly received on the trial of this action brought by the sister. Its effect was to shew the nature of the conduct pursued by the defendant towards both the children, and the object of that conduct, namely, to induce them by the means of terror and alarm operating on their own minds, to accuse their father of some illegal act, which might lay a ground for his being apprehended; and thus, to substantiate against the defendant the charge of having acted throughout the transaction from malicious and unlawful motives. I think that was legitimate evidence in the cause, and, therefore, that there is no pretence for disturbing the verdict on that ground. Neither can I say that the evidence of the children's acquittal at the quarter sessions was improperly received; on the contrary, I am clearly of opinion that the learned Judge was bound to receive it. I take it to have been settled, ever since the case of *Jordan v. Lewis* (a), that in an action for a malicious prosecution, the copy of the indictment may be produced by the plaintiff, and is admissible in evidence, without inquiry into the mode by which he became possessed of it. There the plaintiff and another were indicted at the Old Bailey sessions for forgery, and acquitted, and a copy of the indictment granted to the other only. In an action for a malicious prosecution, the plaintiff offered the copy in evidence, and the order at the Old Bailey granting it to the other only was read by way of objection. But the Chief Justice, *Lee*, said, "he could not refuse to let the plaintiff read the copy of the indictment; for an order was not necessary to make it evidence, nor was it ever produced in order to intro-

(a) 2 Stra. 1122.

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duce it." And the copy of the indictment was accordingly read, and a verdict found for the plaintiff, which the Court afterwards refused to disturb. So, here, though the copy of the indictment may have been granted by the court of quarter sessions for a different purpose than that for which it was used at the trial, still as it was produced by the plaintiff, it was receivable in evidence, without inquiry then into the circumstances under which it was obtained; nor can we now make that inquiry, with a view to grant a rule for setting aside the verdict which has been found for the plaintiff. Neither do I consider that the fact of a criminal information being pending against the defendant, on the prosecution of the plaintiff, and for the same subject matter, is a ground for staying the proceedings in the action. I am aware that in *Rex v. Fielding (a)*, an information was refused, until an action, which had been commenced for the same offence, was discontinued (b); and properly; because, there the Court seeing that the party, having brought an action, was in progress to obtain a civil remedy for the injury he supposed he had sustained, might think it unnecessary to interpose their extraordinary and special jurisdiction in his behalf: but here the party's first application was for an information; and if it was afterwards thought proper to abandon that prosecution, and to resort to a civil remedy, I do not see upon what principle we can interfere to prevent her from reaping the fruits of her verdict. The damages which she has obtained are large; larger, perhaps, than we may think altogether called for by the circumstances of the case:

(a) 2 Burr. 654; 2 Lord Kenyon, 386, S. C.

(b) In *Rex v. Sparrow*, 2 T. R. 198, it is, however, said, that a party applying for an information must waive his right of action; but if the Court, on hearing the whole matter, are of opinion that it is a proper subject for an action, they may give the party leave to

bring it. So, Mr. *Tidd*, in his Practice, (eighth edit. p. 8), says, "It is a rule that the party applying for an information, shall be understood to have made his election, and waived his remedy by action, whatever may be the fate of the motion for the information, unless the Court think fit to give him leave to bring an action."

but it is impossible to forget that the defendant's conduct has been in many respects extremely culpable; and as the whole transaction was fully before the jury, I do not feel myself at liberty to say that they have exercised an improper discretion in awarding the damages they did. Upon the whole, therefore, I am of opinion that no rule ought to be granted in this case.

BAYLEY, J.—I am entirely of the same opinion. It is quite clear that the evidence, both of the boy's ill treatment, and of the copy of the indictment, was properly received at the trial; the first, as being part of the *res gesta*, and tending strongly to shew the *malus animus* of the defendant: and the second, because the plaintiff having once obtained it, had a right to produce it, without explaining by what means, or for what purpose, it came into her possession. Upon the other point of the case I see no ground for our interference; and in an action of this particular kind, where all the circumstances have been fully detailed before a jury, I think it would be highly dangerous to disturb a verdict, which they in the exercise of their sound discretion, and of their peculiar province, have found.

HOLROYD, J., and LITLEDALE, J., concurred.

Rule refused (a).

(a) It appears that originally all judicial records of the King's Courts were open to the public without restraint, and were preserved for that purpose. Lord Coke, in his preface to 3 Co. Rep. 3, speaking on this subject says, "these records, for that they contain great and hidden treasure, are faithfully and safely kept, (as they well deserve), in the king's treasury. And yet not so kept but that any subject may for his necessary use and benefit have access

thereunto; which was the ancient law of England, and so is declared by an act of Parliament in 46 Edw. 3, in these words:—Also the Commons pray, that, whereas records, and whatsoever is in the King's Court, ought of reason to remain there, for perpetual evidence and aid of all parties thereto, and of all those whom in any manner they reach, when they have need; and yet of late they refuse, in the Court of our said Lord, to make search or exemplification

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of any thing which can fall in evidence against the King, or in his disadvantage (a). May it please (you) to ordain by statute, that search and exemplification be made for all persons (*fait as tous gentz*) of whatever record touches them in any manner, as well as that which falls against the King as other persons. *Le Roy le voet.*" And see 3 Inst. 71.

In *Brangan's* case, 1 Leach, C. C. 32, *Willes*, C. J., is reported to have said, "that by the laws of this realm, every prisoner, upon his acquittal, has an undoubted right and title to a copy of the record, for any use which he may think fit to make of it; and, that, after demand, the proper officer may be punished for refusing to make out a copy." The first restriction of this general right appears to have been imposed by an order made by some of the Judges, (the first who are recorded to have refused to seal a bill of exceptions in criminal cases,) for the regulation of the Old Bailey Sessions, (Directions for Justices at the Old Bailey, prefixed to Kelyng's Rep. p. 3, order. 3), in the reign of *Car. 2*, by which it was ordered, "that no copies of any indictment for felony be given without special order, upon motion made in open Court, at the general gaol delivery; for the late frequency of actions against prosecutors, which cannot be without copies of the indictment, deterreth people from

prosecuting for the king upon just occasions." It has, however, been decided, in a case argued long subsequent to that of *Jordan v. Lewis*, 2 Stra. 1122, namely, in *Legatt v. Tollervey*, 1A East, 302, that the formalities specified in that order, are not absolutely necessary for the reception in evidence of a copy of an indictment. There, the plaintiff, in an action for a malicious prosecution, produced, by means of the clerk of the court of quarter sessions, before which the indictment had been tried, a copy, which was rejected for want of an order, and the plaintiff nonsuited. The Court of K. B. were of opinion that the evidence ought to have been received, and set aside the nonsuit; and Lord *Ellenborough*, C. J., said "It is very clear that it is the duty of the officer charged with the custody of the records of the Court, not to produce a record but upon competent authority, which at the Old Bailey is obtained upon application to the court, pursuant to the order that has long prevailed there; and with respect to the general records of the realm, upon application to the Attorney-General. But if the officer, even without authority, shall have given a copy of a record, or produce the original, and that is properly proved in evidence, I cannot say that such evidence shall not be received. He may incur the penalty of his contempt of the

(a) The words of Lord Coke are, "Et ja de novell refusent en la court nostre dit seign' de serche ou evidence encourtr' le Roy ou disadvantage de ly." But this is manifestly a mistake of the printer or transcriber. In the Parliament Rolls it stands thus:—

"Et ja de novell refusent en la court nostre dit seign' de serche ou exemplification faire des nulles riens que purra chier en evidence encourtr' le Roi ou desavantage de ly." 2 Rot. Parl. (46 Edw. 3), fo. 314. See also 10 Rappington's Statutes, Appendix, 45.

court, and may be warned, at the time, of his peril in so doing; and a discreet officer placed in such a situation would, before he produced the record, or gave a copy of it, apply to the Court, and state the circumstances; and it cannot be doubted, that he would be saved harmless in doing what, after such disclosure, the court should order him to do. But still I cannot help thinking, that

the rule laid down by Lord Chief Justice *Lee*, in the case of *Jordan v. Lewis*, 2 Stra. 1122, is the correct rule. The order made at the Old Bailey was there read by way of objection to the evidence offered, but the Chief Justice in that case said, that he could not refuse to let the plaintiff read the copy of the indictment, though obtained without any order of the Court for that purpose."

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CLEMENT v. FISHER, in Error.

7 B. & C. 459
THE first count of the declaration stated, that *Fisher*, the plaintiff below, was a married man, the father of eight children; that one *John Joseph Stockdale* had printed and published of and concerning plaintiff, a certain false, &c., libel, containing amongst other things, the false, &c., matter following, of and concerning the said plaintiff. The declaration then went on to set out a libel upon the plaintiff, purporting to be written by one *Harriette Wilson*, in which the plaintiff is charged with "making love to several women at the same time, although he is a married man," and is called "a dirty Devonshire lawyer," and "a wretch." The declaration then stated, that *Fisher* impleaded *Stockdale*, for the printing and publishing of such libel; that *Stockdale* pleaded not guilty, and that a verdict was found for the plaintiff *Fisher*, damages 700l; that *Clement* contriving to injure, &c. *Fisher*, and to cause it to be believed that he had been guilty of the misconduct thereby imputed to him, and that he, being such husband and father, was an abandoned and profligate man, and had been, and was frequently engaged in intrigues and immoral connections with

A declaration stating, that defendant "published a false, scandalous, malicious, and defamatory libel of and concerning the plaintiff, containing amongst other things, the false, scandalous, malicious, defamatory, and libellous matter, following, that is to say, — is bad, for not averring that such libellous matter was "of and concerning the plaintiff;" unless the words set out distinctly point to the plaintiff, or that applica-

tion is given to them by an innuendo.

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females, did print and publish, &c. The first count then proceeded to set out a libel published by defendant below, upon which nothing turned upon the argument of the writ of error. The second count stated, that the defendant contriving, &c., did print and publish of and concerning the said plaintiff, and of and concerning the said first mentioned libel, and of and concerning the said verdict, a certain other false, &c., libel, containing therein, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter, following (a), that is to say. The declaration then proceeded to set out some doggrel lines, entitled "*St—ckd—le and Harriette W—ls—n, a London Eclogue.*" These lines represented a conversation between *Stockdale* and *Harriette Wilson*, designated throughout by the above imperfect words, respecting the publications of the latter. The parts which were supposed to relate to the plaintiff *Fisher*, were these—"With recent verdicts out of tune. To *Fisher* (thereby meaning the said plaintiff), *Blore*, large sums were given, to one three hundred, t'other seven. Much *St—ckd—le* feared lest such a sample, make others follow the example. *Stockdale*. 'Twould be too hard to pay for truth.—*Harriette*. But truth has a far keener tooth than falsehood, for we may despise what we all know a pack of lies. I wrote what was not only new, but also in its substance,—(thereby meaning in its substance, true)."

To this declaration *Clement* pleaded not guilty, and upon the trial before *Best*, C. J., at the sittings at Guildhall, after last Michaelmas term (b), a general verdict was found for the plaintiff, damages, 30*l*. Judgment was given for these damages, and also for 77*l*. 10*s*. costs.

The errors assigned were. 1st. The insufficiency

(a) The words "of and concerning the plaintiff," which had stood in the special pleader's draft, were here accidentally omitted.

(b) Counsel for the plaintiff, *Wilde*, Serjt., and *Manning*; for the defendant, *Taddy*, Serjt., and *Platt*.

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of the declaration. 2d. That the alleged false, &c., matters set forth in the first and second counts of the declaration, and for the said *Clement's*, printing and publishing of which, *Fisher* has in those counts respectively complained against *Clement*, are not described in those counts or either of them, as scandalous, defamatory, and libellous, of and concerning *Fisher*. 3d. That the alleged false, &c., matters in the several counts of the said declaration set forth, and described as having been contained in the alleged libels, with the printing and publication whereof said *Fisher* had in those counts charged the said *Clement*, do not appear in or by those counts, or any or either of them, to be scandalous, defamatory, or libellous, of and concerning the said *Fisher*. 4th. That it does not appear, in or by the said declaration, that the said *Clement* did, at any time, print or publish any specific matter which by the law of the land could be deemed scandalous, defamatory, or libellous, of or concerning the said *Fisher*. 5th. That it does not appear in or by the said record, that the said *Clement* was guilty of any wrongful act towards, against, or as regards the said *Fisher*, the commission of which by the said *Clement* could have entitled the said *Fisher*, by the law of the land, to maintain an action for recovery of damages against the said *Clement*. 6th. That judgment ought to have been given for the defendant below.—Joinder in error.

Platt, for the plaintiff in error. It is sufficient to shew that one of the counts of this declaration is bad. In the second count, the libellous matter is not alleged to have been published of and concerning the plaintiff. In *Rer v. Marsden* (a), judgment was arrested for want of an averment, that the libel was published of and concerning the plaintiff. [Lord *Tenterden*, C. J. That was the case of an indictment]. In *Wright v. Clements* (b), a declaration stating that the defendant published of and concerning the

(a) 4 M. & S. 164, *post*, 287.

(b) 3 B. & A. 503.

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plaintiff, a libel containing amongst other things, certain false, scandalous, malicious, and defamatory words, of and concerning the said plaintiff, *in substance* as follows, that is to say, was held bad in arrest of judgment. [*Bayley, J.* Here the first libel is stated at length]. What is called the first libel conveys no imputation against the plaintiff. He is called a provincial Adonis, a six feet high, black eyed, Devonshire attorney. The doggerel lines which the defendant published were meant as an attack upon *Stockdale* and *Harriette Wilson*, but do not affect the plaintiff.

Manning, contra. The libel published by *Stockdale*, contained a gross attack upon the plaintiff's moral character, and the second publication by the defendant, averring the truth of the former libel, is equally defamatory of the plaintiff. In *Rex v. Marsden*, it was not averred that the libel was so published, and the omission to repeat these words in setting out the libellous matter is cured by the verdict. Here the matter published by the defendant, and forming part of a libel, of and concerning the plaintiff, either contained a charge against the plaintiff, or against some other person, or was no libel at all. Upon the two latter suppositions, it cannot be intended that any damages were given by the jury in respect of this count. But the principle upon which judgment is arrested after a general verdict, where there is a bad count, is, that the jury must be taken to have given something in respect of the bad count. Supposing this rule to apply to a case where the objection to the count, is, not that the count discloses an insufficient ground of complaint subsisting in the plaintiff, but that the plaintiff is not sufficiently connected with the injury, the jury cannot be presumed to have given damages in respect of this count, without its being proved to the satisfaction of the learned Judge who tried the cause, that the libellous matter was published of and concerning the plaintiff. The rule is, that the omission of any cir-

circumstance without proof of which at the trial it is impossible to support the action, is aided by verdict; and he referred to the cases collected by Mr. Serjeant Williams, in his note (a), to *Stennel v. Hogg*. In *Skinner v. Gunton*

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(a) 1 Wms. Saund. 228, n. 1.

Hall v. Marshall, Cro. Car. 497; the declaration stated, that defendant had sold plaintiff all the furze growing upon such land, to be taken before Michaelmas 1635, without disturbance, and that defendant had disturbed plaintiff; without saying, "before Michaelmas." After verdict and judgment, it was assigned for error, that the disturbance was not alleged to be before Michaelmas. "But all the Court resolved that this is no cause of error; for being after verdict, it is intended that it was within the time, the defendant having pleaded non assumpsit, and the cause of the damage appearing at the trial, otherwise there had been no cause to have damages."

Hitchins v. Stevens, Sir Tho. Raym. 487; debt for rent by assignee of reversion without alleging attornment. "And resolved good enough without it, after a verdict; for it is apparent, that if the plaintiff had not given the attornment in evidence, he must have been nonsuited." In the report of this case, in 2 Show. 233, it is said, a rule was taken and agreed by all the Court, that in any case where any thing is omitted in a declaration, *though it be matter of substance*, if it be such as without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, such omission shall not arrest the judgment.

Monnington v. William, 1

Ventr. 109, Arowant made title by grant in indenture of bargain and sale, without stating a consideration in money. Issue on the grant found for the avowant. "The Court held the pleading good after verdict; and it shall be intended that evidence was given of money paid." 1 Levinz, 308, *Mannington v. Guillins*, S. C.

Alston v. Buscough, Carthew, 304, Debt for the treble value of tithes, without alleging that defendant had made no agreement for the tithes. Held: "that the declaration was ill, for the reason *supra*, if it had been upon a demurrer; but that this was helped by the verdict; for if there had been any agreement proved at the trial, the plaintiff would not have obtained a verdict."

Gostwick v. —, 1 Sid. 423. Debt for rent of the third year, upon a demise from year to year, without averring continuance of possession; aided after verdict.

Anon., 2 Lord Raym. 1060, Declaration, that in consideration, plaintiff had promised defendant to buy up all the plums he could and deliver them to him, defendant undertook to pay plaintiff so much per hundred. Averment, that plaintiff bought and tendered to defendant so many plums, which defendant refused to accept. Objected, that plaintiff had not averred that the plums he tendered were all he bought, or could buy; but to that it was answered and resolved, that that was now cured by the verdict; for unless

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and others (a), which was an action for a conspiracy, maliciously to procure the plaintiff to be held to bail,

the plaintiff had proved that these were all he bought or could buy; it would have passed against him for not proving the performance of the condition.¹⁰ Sir J. Holt, 567, S.C.

In *Wickes v. Morris*, the error, the declaration, which was in debt for an amercement in a court leet, omitted to state that the defendant was a resident within the manor at the time of the presentment of the offence, or the setting of the amercement.—"We are of opinion it is cured by the verdict; because it need have been proved at the trial, that defendant was an inhabitant at the time of the amercement, otherwise the amercement was *coram non iudice*, and therefore void, and consequently the jury could not have found that there was any debt at all."

¹¹ *Clark v. King*, 3 T. R. 147. *Plac.* that A. C.; and all those whose estate, &c., have had, and used, and have been accustomed to have, and are, and of right, ought, &c., common of pasture, on, &c., without alleging an immemorial right:—Held sufficient after verdict; the Court saying, "It states a right of common in all those who have taken that estate; and unless a prescription had been proved, the plaintiff would not have obtained a verdict."

¹² In *Markward v. Smith*, 7 T. R. 518, the omission of an averment in a declaration for printing a pattern for printing calico, "that the day of the first publishing of the pattern was printed at each end of the piece of calico," as required by

the statute, was held to be aided by verdict.

In *Spier v. Parkin*, 1 T. R. 145, Buller, J., states the rule thus:—"After verdict, nothing is to be presumed but what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated—as where a feoffment is pleaded without livery, a livery is always implied, because it makes a necessary part of a feoffment. I know of no decision against this rule." By "what is necessarily implied," the learned Judge probably meant the same with that which, in the former cases, is designated as "that without proving which the plaintiff could not have had a verdict;" but in the particular instance put, it appears that the objection could not have been supported upon special demurrer; for in *Throckmorton v. Tracy*, Plowd. 149, b, it is said, "livery shall not be pleaded where a man makes a lease for life, or a gift in tail or in fee, but shall be intended to be made." So, Co. Litt. 303 b. And see *Ward v. Harris*, 2 Bos. & Pul. 265; *Pippet v. Hearn*, 5 B. & A. 634; 1 D. & R. 265.

In cases where the jury find a verdict not warranted by the evidence, and an application for a new trial has either been neglected to be made, or has been made without success, this rule may occasion hardship. Thus, in *Ris v. Bishop of Llandaff*, 2 Stra. 1008, the Court held that in *quare impedit* by the crown,

the want of an averment that the first suit was terminated, was held to be cured by verdict. That was a very strong case, for it is conceivable that the jury may have found the defendants guilty, without proof of a legal termination of the first action. In *Stennel v. Hogg* (b), a verdict finding a prescriptive right of common, was held to cure the omission of an averment, that the cattle were on the land in which the common was claimed, or that they were levant and couchant on the land to which the common was appurtenant. In *Rex v. Marsden* (c) there was no allegation that the libel itself was "of and concerning the prosecutor." Besides which, that was a criminal proceeding. In *Dalby v. Hirst* (d), the rule as to the effect of a verdict in curing omissions, is laid down very clearly.

Platt, in reply, again adverted to *Rex v. Marsden* (c):

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court. This is an action for a libel. The second count proceeds thus. "And the said plaintiff further saith, that the said defendant, further contriving and intending as aforesaid, heretofore, to wit, on, &c., at, &c., falsely, wickedly, and maliciously did print and publish, and cause and procure to be printed and published, of and

a presentation must be alleged, and that a *commendam retinere*, does not amount to a presentation; but, that when the jury find that the king is seized in fee *et de uno genero*, the want of an allegation of a presentation is cured, as after such a verdict it must be presumed that a presentation was proved. The Court accordingly affirmed the judgment for the crown, but, where the entire right of presentation has been ever since

exercised, although by the king in the cause, still extant; and by the presentations themselves, it appears that no other presentation than a *commendam retinere* was, or could have been, proved in respect of that turn. Upon the right of the crown to the other alternate presentation, there was no question. (b) 1 Saund. 220, 226. (c) 4 M. & S. 164; Anst. 238; 10 J. B. Moore, 324; 3 J. B. Moore, 536, S. C.

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concerning the said first mentioned libel, and of and concerning the said verdict, a certain other false, scandalous, malicious, and defamatory libel, containing amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, that is to say," without averring that the part of the libel set out was "of and concerning the plaintiff." This form would not have been necessary if there had been any innuendo in setting out the libel, applying any thing therein mentioned to the plaintiff, or to the former libel, or if upon perusal of the matter set out, it manifestly appeared that the matter applied to the plaintiff. But upon the matter set out, it appears quite impossible for the Court, on reading that matter, to see that the libel is of and concerning the plaintiff. The judgment, therefore, must be reversed, and a *venire de novo* awarded.

Venire de novo (a).

(a) And see *Cook v. Cox*, 3 M. & S. 110.


HOWES v. BALL.

An agreement between vendor and vendee of a chattel, that the former may resume the possession if the price be not duly paid, is a personal contract, not binding on alienee, or personal representative of vendee.

TROVER, for a stage coach. Plea, not guilty. At the trial before *Abbott*, C. J., at the London adjourned sittings after last Hilary term (b), the case proved on the part of the plaintiff, was this. The plaintiff was the widow of *John Howes*, a stage coach proprietor, who purchased the coach in question of the defendant in April, 1826, and used it in his business down to the time of his death, in September, 1826. After his death, the plaintiff had carried on the business, and used the coach, as before. The defendant had done some repairs to the coach, both before and since the death of *Howes*, for which it did not

(b) Counsel for the plaintiff, the defendant, *Gurney and Chitty*. *Scarlett* and *R. V. Richards*; for

appear that he had been paid. In November, 1826, the coach requiring a new set of wheels, they were prepared by the defendant, and the coach was driven to his yard by the plaintiff's servant, for the purpose of having the new wheels put on. The defendant desired the plaintiff's servant to drive the coach up the yard, and to take off the horses, and the wheels should be changed immediately; but upon that being done, he declined putting on the new wheels, and detained the coach, saying, that he would not let it go off his premises any more till it was paid for. There was no proof that the amount of the defendant's claim for repairs done to the coach had been tendered to him, nor of any formal demand of the delivery of the coach; and it was thereupon contended for the defendant that the plaintiff must be nonsuited. The Lord Chief Justice, however, declined directing a nonsuit, and the following defence was then set up. First, an agreement between the plaintiff's deceased husband and the defendant, in the following terms was proved and read.

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"London. This agreement between *John Howes*, coach-proprietor, of the one part, and *Thomas Ball*, coach-maker, of the other part, sheweth, that I, the said *John Howes* do hereby agree to give the said *Thomas Ball* the sum of 100*l.* for a new stage coach, payment of which to give the said *Thomas Ball* four bills of 25*l.* each, and further, I, the said *John Howes* do agree that the said *Thomas Ball* do have and hold a claim on the said coach until the debt be duly paid." Signed by the parties. Witnessed by "*R. Talbot*." Dated 25th April, 1826.

It was further proved that four bills of exchange, for 25*l.* each, dated 8th July, 1826, at three, six, nine, and twelve months' date, drawn by the defendant upon and accepted by Mr. *Howes*, were given to the defendant—that the first which became due 11th October, 1826, was

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duly presented for payment and dishonoured—and that the defendant had done repairs to the coach, in the lifetime of Mr. *Howes* to the amount of 5*l.* 2*s.* 4*d.*, and since his death to the amount of 1*l.* 12*s.*, for which he had not been paid. Upon this evidence it was contended that the defendant had a lien upon the coach, which justified his detaining it in the manner above described. The Lord Chief Justice declined giving any immediate opinion upon the effect of the agreement, but reserved the point; and the plaintiff, under his lordship's direction, had a verdict for the value of the coach, with liberty to the defendant to move to enter a nonsuit. In Easter term last, a rule *nisi* was obtained accordingly, against which

Scarlett, A. G., and *R. V. Richards*, shewed cause. There is no ground for disturbing this verdict. The two questions arising upon the agreement, seem to be these. First, whether the legal effect of the agreement was to give the defendant a lien upon the coach, such as entitled him to resume the possession of it at the time he did; and secondly, whether, even if that be its legal effect, the defendant can be allowed to retain a possession which he has resumed by practising a gross and deliberate fraud. It is submitted that neither of these questions can be answered in the affirmative. First, in order to ascertain the legal effect of the agreement, its language must be considered. The right which, in words, it confers upon the defendant is to "have and hold a claim upon the coach until the debt be duly paid." Under that special agreement the defendant, perhaps, might have insisted upon keeping the coach in his own possession, without ever delivering it to *Howes*, until the whole of the purchase money was paid; but it certainly could not give him the right, having once parted with the possession of the coach, to resume it from time to time as interest or caprice might dictate. The coach was sold upon credit; and a sale upon credit is utterly incon-

sistent with the idea of the vendor retaining a lien upon the goods sold: so that, but for the special agreement the defendant would have been bound to deliver the coach in the first instance, whether any part of the purchase money was paid or not. It seems very questionable whether such an agreement would bind the personal representative of the party. A lien implies that the property remains in the hands of the party insisting on the lien. It will be contended on the other side that the defendant's original lien, though waived by the delivery of the coach to *Hosers*, yet revived upon the first bill becoming due and being dishonoured; but the argument, though specious, is not sound; because the original lien was not a right to keep the coach till the first bill was paid, (though if it had been, it was waived by delivery, and could not revive): but was a right to have and hold a claim on the coach until *the debt*, that is the *whole* debt, was paid; and that lien having been waived by delivery could not revive, at least until the period for the payment of the whole debt had arrived, that is, until the last of the four bills had become due and had been dishonoured (a), of which only one had become due. Is the defendant to take back the property and hold it till all the bills become due? Or is the lien to revive every three months? Secondly, even if the defendant had such a reviving lien, as gave him a right to resume the possession of the coach after having once delivered it, still he cannot enforce that right by means of falsehood

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(a) *A.* having repaired a carriage for *B.*, allowed him to take it away from time to time: *A.* cannot afterwards detain the carriage for the amount of the repairs; nor upon a claim for standage, without an express contract to pay for standage, or unless the owner left it upon the premises beyond a reasonable time after notice. *Hartley v. Hitchcock*, 1 Stark. N. P. C. 408. But where *A.* sells a carriage to *B.*, to be paid for partly by a bill on delivery, and partly by a bill at a future day, and *B.* neglecting to take the carriage, *A.* obtains a verdict against him for goods bargained and sold; *A.* has a lien upon the carriage until the amount is paid. *Houlditch v. Desanges*, 2 Stark. N. P. C. 337.

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and fraud ; for a legal right cannot be enforced by means of an illegal act. *Maddon v. Kempster* (a).

Gurney and Chitty, contra. The construction given to the agreement by the other side deprives it altogether both of meaning and effect, and renders it a mere nullity. The coach was sold upon credit, to be paid for by bills at three, six, nine, and twelve months' date. When the first bill became due it was dishonoured, and it is not pretended that one farthing of the purchase money has been paid even to the present day. It is admitted that the defendant had so far a lien upon the coach, that he might have detained it in the first instance until the whole of the money was paid, without delivering it to *Howes* at all. But that would not have suited the purpose of either party, and a different arrangement, therefore, was made. By that arrangement *Howes* was to have possession of the coach for the purpose of using it in his trade, and the defendant was to "have and hold a claim upon the coach until the debt was duly paid." What is the fair meaning of those latter words? Clearly that whenever the due course of payment was stopped, that is, whenever any one of the four bills was dishonoured, the defendant should be entitled to resume possession of the coach ; and as the first bill was dishonoured, the defendant then had a right to take the coach again into his own possession. The parties must have intended the agreement to bear some meaning and to have some effect ; and unless this construction be adopted, it has no meaning or effect ; for in no other way

(a) 1 Campb. 12, where it was held that a party who has obtained possession by a misrepresentation cannot set up a lien. See *Griffiths v. Hyde*, Selw. N. P. 1388, 7th ed., where it is stated to have been laid down as a general proposition by *Lawrence, J.*,

that a party cannot acquire a lien by his own wrongful act. So, goods delivered to a person claiming them wrongfully, who pays freight and other charges, cannot be detained for those expenses against the rightful owner. *Lempriere v. Pasley*, 2 T. R. 485.

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of construing it, can it be of the least security or benefit to the defendant, for whose advantage it must have been designed. This agreement is not contrary to the policy of the law. It is analogous to the power of re-entry in leases. But then it is said, that by law, the defendant's original lien having been waived, it could not revive. It is denied, on the part of the defendant, that his lien was waived; but even if it was, it might still, under the circumstances of this case, revive. It was held in *Levy v. Barnard* (a), that though a broker may have parted with the possession of a policy, still, if he become repossessed of it, he has a lien upon it for the premiums which may be unpaid; and in *Whitehead v. Vaughan* (b), that brokers have a general lien upon policies in their hands, and that if a broker parts with the possession of a policy, the lien revives when the policy comes again into his hands. Then if a once existing lien, having been waived, may revive without any agreement for that purpose, by mere operation of law, *à fortiori*, it may revive by means of a special agreement for that purpose; and there is clearly such a special agreement in this case. The administratrix cannot stand in a better situation than the intestate, for as against the party who made this contract, the defendant would have been entitled to take the coach. Then the little device or stratagem practised by the defendant in this case, for it does not deserve the harder title of fraud, cannot operate to deprive him of his legal right. The coach was brought to his yard by the plaintiff's servant, he did not in the first instance set about obtaining possession of it; but finding it on his premises he procures the horses to be taken off, and refuses to part with the coach until his debt is paid. This he was justified in doing, and upon these grounds it is confidently submitted that this rule for entering a nonsuit ought to be made absolute.

Cur. adv. vult.

(a) 8 Taunt. 149; 2 J. B. (b) Cooke's B. L. 8th ed. 576. Moore, 34.

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Lord TENTERDEN, C. J., now delivered the judgment of the Court. After adverting to the leading facts of the case, his lordship said, taking these facts into our consideration, we think the transaction amounted to a sale, and transferred the property in the coach from *Ball* to the intestate *Howes*. Admitting the effect of the instrument to be to confer on the defendant a licence to resume the possession of the coach, such licence must be considered as personal, and could not avail against an alienee, or a person to whom the property was transferred by operation of law, though such licence might have been given in evidence, if the action had been brought by the original vendee.

Rule discharged.

The KING v. The Inhabitants of DENIO.

Proof by an apprentice, that when his apprenticeship expired he asked his master for the indenture, who said it was with the overseers of the parish; and that their successors had searched for the indenture, but could not find it; is not sufficient to let in parol evidence of the contents of the indenture; the master being alive, and not subpoenaed.

THIS appeal against an order of removal was tried at the last Easter Quarter Sessions for the county of Anglesey, when it appeared, that the pauper, being a poor boy belonging to the parish of Llanbeblig, in the county of Carnarvon, was bound by the overseers of the poor of that parish, as apprentice to one *John Connell*, a hatter, residing at Pwllhely, in the parish of Denio, about 23 years ago, by an indenture, for seven years; on which the pauper said he believed there was a stamp, that it was signed and sealed, but that there were no justices present at the time of the signing and sealing of the indenture, nor did the pauper recollect being at any other time before any justices respecting it; and there was no evidence that the assent of two justices had been given, or that the parish officers were parties to the indenture; that the indenture was then kept by the said *John Connell* the master, and the pauper never saw it afterwards; that the pauper served in Denio, under the

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indenture of apprenticeship, for the whole term of seven years; that when the apprenticeship expired, the pauper asked his master *John Connell*, who was then a rated inhabitant of the parish of Denio, but did not reside or pay taxes there when the appeal was tried, for the indenture, who said that he had not got it, but that it was with the overseers of Llanbeblig. No other witnesses were called, nor any further evidence given respecting it, except that the present parish officers of Llanbeblig proved at the trial, that they had searched among the papers belonging to that parish for the indenture, and that it could not be found; and that all the parish books and papers of about that time were missing. The appellant's solicitor objected to the declaration of *John Connell* to the pauper, that he had not got the indenture, and that it was with the overseers of Llanbeblig, being received, and urged that *John Connell* himself ought to have been called to prove that fact: but the Court overruled the objection, and received the evidence. The appellant's solicitor contended that the loss of the indenture had not been sufficiently proved or accounted for, to let in parol evidence of its contents, and that it was incumbent on the respondents to prove the assent of two justices to the binding of the pauper, before he could gain a settlement by service under it. The Court confirmed the order of removal, subject to the opinion of the Court of King's Bench, as to the correctness of the conclusion, whether the declarations of *John Connell* to the pauper were properly received in evidence; whether, according to the foregoing facts, the loss of the indenture was sufficiently proved, or accounted for, to let in parol evidence of its contents; and whether it was not incumbent on the respondents to prove the assent of two justices to the binding of the pauper.

Nolan, in support of the order of sessions. There was sufficient done in this case to let in parol evidence of the

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contents of the indenture. Every possible search was made for the indenture itself, for the pauper demanded it of his master, who informed him that he had not got it, but that it was in the possession of the parish officers of Llanbeblig; and they searched in the place, where alone it could be expected to be found if it was in existence, and could not find it. The declaration of the Master under such circumstances, was part of the *res gesta*, and might be fairly presumed to be true, because as he was at the time a rated inhabitant of the parish, he was speaking against his own interest. In *Rex v. Morton (a)*, in order to establish a settlement by apprenticeship, it was proved that only one part of the indenture was executed, and that upon application to the pauper, (who was then ill, and died soon afterwards), to know what had become of it, he declared, that when the indenture expired, it was given to him, and he had burned it long since; and it was also proved, that inquiry was made of the executrix of the master, who said that she knew nothing about it: and it was held, that this proof was sufficient to let in parol evidence of the contents of the indenture. Now, if the declaration of the executrix of the master was admissible evidence in that case, *à fortiori* the declaration of the master himself was admissible evidence in the present case.

Patteson, contra, was stopped by the Court.

BAYLEY, J.—I think it impossible to support the decision of the sessions in this case. *Rex v. Morton* is very distinguishable. There the application to the executrix of the master was made by the parish officers; here it was made by the pauper. The evidence here was mere hearsay; and it would be contravening the first principles of the law of evidence, to hold it admissible. *Connell*, the master, who is supposed to have given the information stated by the pauper, was alive; and ought to

have been called to give his own account of the transaction. In order to let in parol evidence of the contents of a written instrument, it must be proved that reasonable diligence has been used, and due search made, to find the instrument itself. That was not proved in the present case. Much more was done in *Rex v. Morton* than was done here. *Rex v. Castleton (a)*, comes much nearer the present case. There it was proved that the indenture was of two parts, that one had been destroyed, and that the other had come to the hands of A. B., who, when asked for it, said she could not find it. But A. B. was not subpœnaed, and upon that ground the evidence was deemed insufficient. Upon that authority, and upon general principles (b), therefore, I am of opinion that the order of sessions must be quashed.

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The other Judges concurred.

Order of Sessions quashed.

(a) 6 T. R. 236.

(b) If I make a gift of lands in tail, or a lease for life or for years, so long as the particular estate has continuance, the donee or lessee is entitled to the custody of the instrument by which that estate was created. If my interest in the conditions or covenants annexed to the grant require that I should have the possession of an instrument, by which those conditions or covenants can be more conveniently enforced, I may take a counterpart of the indenture from the donee or lessee. On the determination of the particular estate, the representatives of the donee in tail, or of the lessee for life, or the lessee for years, or his representatives, are mere strangers to the land, and have no interest in any deeds relating to it; and though I have no longer any interest in the conditions or covenants, yet

the mere fact of my having asserted and exercised the power of making such estates, is evidence of my seisin; and, consequently, the documents in which that evidence is recorded are important muniments of my title. The original deeds creating the estate tail, or for life, or for years, belong therefore to me; and I may maintain detinue for them. Pasch. 38 H. 6, fo. 24, pl. 1. And see Co. Litt. 47 b, 48 a, 229 a; 2 Tho. Co. Litt. 227, 418; 1 Co. Rep. 1; 13 Vin. Abr. Faits Z. In accordance with this principle, where the former owner of an advowson was alleged to have granted the then next presentation, which grant was put in issue by a plea in *quare impedit*, the original deed of grant not being found annexed, as usual, to the presentation, it was held that the proper custody was amongst the muniments of the party now seised of

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the advowson; and a counterpart, purporting to be executed by the grantee, was held to be admissible as secondary evidence of the grant, without proving a search amongst the papers of the personal representatives of the grantee. *Gulley v. Bishop of Exeter and Dowling, C. P., T. T. 1827.* In that case, no profert of the grant appears to have been necessary. In *Mich. 26 H. 8, fo. 9 a*, it was said, by *Deinshel*, arguendo, "If I am seised of an advowson in fee, and then grant *proximam advocacionem hinc vice*, and the grantee presents, and the heir of the grantee disturbs me, claiming fee, and I bring *quare impedit*, and allege a presentation and the grant *hinc vice*, I must

make profert of the grant; because that proves the presentation to be made in my right, and me to be in possession. *Quod fuit negatum per omnes iusticiarios*; and they said that the law was clear, that it was not necessary for the grantor to show the deed. *Quod nota*; and so it hath been adjudged divers times, *ib.*" *S. P. Mich. 14 H. 4, fo. 10, pl. 9*; *Plowden, 149 a.* In *Res v. North Bedburn, Cald. 457, Buller, J.*, is represented to have said, "After the expiration of the lease, the lessee, the pauper, was entitled to it in strictness." But this is directly contrary to *Co. Litt. 47 b, 48 a*; *4 Co. Rep. 54 a.* And see *Brewster v. Sewell, 3 B. & A. 296. 1 Co. Rep. by Fraser, 7 n.*

WHITTLE, Assignee of NASSAU, Esquire, late Sheriff of Essex, v. OLDAKER, and others. *J. R. H. 470*

After a rule to bring in the body, defendant has the same time to justify bail, as the sheriff to bring in the body, namely, four days in town and six in country causes.

A rule to bring in the body does not bind the plaintiff to proceed by attachment; at the expiration of that rule, he may sue upon the bail-bond.

THIS was an action on a bail bond. The declaration stated, that on the 28th of November, 1826, plaintiff sued out a *latitat* against defendant *Oldaker*, directed to the sheriff of Essex, returnable on Monday next, after fifteen days of St. Hilary; that this writ was duly indorsed for bail for 541*l.* 5*s.*; that the writ was delivered to the sheriff, who arrested *Oldaker*, and took bail for his appearance at the return of the writ, from *Oldaker*, and the two other defendants as his sureties, by a bond, conditioned for the appearance of *Oldaker* at the return of the writ. The declaration then stated the non-appearance of *Oldaker*, and the assignment of the bail bond.

Plea, 1st, *non est factum*, and issue thereon. 2dly, *comperuit ad diem*. Replication to the 2d plea, *nul tiel record* of the said supposed appearance.

Award of *venire*, on issue triable by the country.

Rule to produce the record on Monday next after fifteen days of the Holy Trinity (25th June).

Record produced, and judgment accordingly.

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Marryat had obtained a rule, calling on the defendants to shew cause, why the judgment "that they had produced the record of appearance," should not be set aside, upon an affidavit, stating the following facts: The writ was returnable on Monday next after fifteen days of St. Hilary, being the 29th of January. The rule to return the writ expired on the 5th of February, and on the same day, bail was put in, and notice of bail served. On the 6th, notice of exception against the bail was served, and the sheriff was ruled to bring in the body. On the 7th, notice of justification of bail was served for the 10th, but was afterwards abandoned; and on the 8th, a fresh notice of justification was served for the 12th. On the 12th the bail justified, and on the same day, before the rule for bringing in the body had expired, and after the bail had justified, the plaintiff took an assignment of the bail bond, and issued writs thereon against the original defendant and the bail. A rule for the allowance of the bail was also drawn up, and served on the 12th; but it did not appear whether that rule was served before or after the writ was sued out. The question was, whether the bail had justified in due time, so as to make the subsequent assignment of the bail bond, and the proceedings thereon, irregular.

Campbell and *Rowe* shewed cause against the rule—contending that the bail had, under the circumstances of the case, justified in due time, and that the plaintiff's proceedings upon the bail bond were irregular. It is well established in practice, that in bailable actions, the rules upon the sheriff, and the time allowed the defendant for putting in and perfecting bail, are concurrent, and expire together. In this case the sheriff could not have been

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attached until the seventh day after the granting of the rule for bringing in the body; but the bail was perfected a day sooner, namely, on the sixth day after the granting of that rule: on which day the defendant might have been rendered, and the bail thereby wholly protected. It will, doubtless be contended, on the other side, that the old rule of court, of Easter term, 5 *Geo. 2* (a), requires justification of bail within four days after exception; but more recent rules of Court, and the modern practice also, have allowed the sheriff six days to bring in the body: and then the principle already adverted to, namely, that the defendant shall be allowed the same time for perfecting his bail, as the sheriff is allowed for bringing in the body, comes into full operation. Upon the same principle the rule of Court of Trinity term, 33 *Geo. 3* (b), allows the bail the same time to render the defendant, as the sheriff is allowed to bring in the body. The case of *Bond v. Evans* (c), may also be relied on by the other side. It was certainly there held, that if bail do not justify within four days after exception, the plaintiff may proceed upon the bail bond, even though the

(a) Which orders, "That in every action in this Court, where special bail is put in, and an exception is entered against the said bail, and notice of such exception is given in writing to the defendant's attorney, the defendant shall procure the said bail to justify (if the notice be given in term time) within four days next after such notice, or shall add other bail, who shall justify within the said four days; but if such exception be entered in vacation time, and notice thereof be given in like manner, the bail put in, or other additional bail, shall justify upon the first day of the subsequent term."

(b) Which recites that, "by the present practice of this Court, the

bail put in for the defendant in any action cannot render such defendant, after a rule has been granted against the sheriff to bring in the body, before such bail have justified themselves in open Court;" and orders, "that from and after the last day of this term, bail shall and may be at liberty to render the defendant, notwithstanding such rule, at any time before the expiration thereof; the attorney for the defendant giving notice of such render to the plaintiff's attorney without delay, and making affidavit thereof."

(c) 7 D. & R. 374; 4 B. & C. 864.

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bail were put in earlier than was necessary; but it was also held that the plaintiff cannot attach the sheriff till the rule for bringing in the body has expired: and as it does not appear that there were any proceedings against the sheriff in that case, the result of it seems to be that the plaintiff is entitled to proceed upon the bail bond, in the event of the bail not justifying within four days after exception, in those cases only where the sheriff has not been ruled to bring in the body, and then, that case has no application to the present. And this is consistent with good sense; for if the plaintiff can be allowed to proceed upon the bail bond at the end of the four days, while he has a rule pending against the sheriff, which has then two days to run, all the principles upon which the present practice is founded must be violated, and this absurdity will follow, that the bail may render the defendant, although the defendant cannot justify his bail, on the sixth day. The present practice, as it has been long settled and acted upon, seems to be this:—In town causes, the question with respect to the difference between the four days and the six cannot arise. In country causes, the defendant is allowed six days to put in bail; then, if the bail are excepted to, he is allowed four days more to justify them, if the plaintiff has not ruled the sheriff to bring in the body, but if the plaintiff has ruled the sheriff to bring in the body, then, in all cases, whether town or country, the defendant is allowed the same time for perfecting his bail, as the sheriff is allowed for bringing in the body.

Marryat and Reader, contra. The recent case of *Bond v. Evans (a)*, is directly in point with the present, and is decisive to shew that the plaintiff was regular in proceeding upon the bail bond. The Court there decided the practice, after mature consideration, to be, “that the defendant is bound to justify his bail within four days after exception, even though the bail may have been put

(a) 7 D. & R. 374; 4 B. & C. 564.

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in earlier than was necessary ; and that if he does not, the plaintiff may take an assignment of the bail bond and proceed against the bail immediately, although he cannot attach the sheriff until the rule for bringing in the body has expired." [*Bayley, J.* There were no proceedings against the sheriff in that case ; here there are]. The rule of Court of *Easter* term, 5 *Geo. 2*, requires the bail to justify within four days after exception ; and that was not done here : but, on the contrary, the bail bond was assigned before the justification of the bail. [*Bayley, J.* But it was not put in suit till after the justification of the bail]. The defendant here was bound to justify his bail within four days after exception ; those four days expired on Saturday the 10th of February, on which day the bail did not justify : his default, therefore, was complete on that day, and it surely cannot be contended that the justification of the bail, after default committed, can prevent the bail bond being assigned and put in suit. [*Bayley, J.* But where the plaintiff rules the sheriff to bring in the body, does he not virtually extend the time for justifying the bail from four days to six ?] The defendant carried in a false recognizance roll ; for the roll was made up as of the first day of the term, whereas the writ was not returnable till the sixth day : therefore he practised a gross fraud upon the plaintiff. [*Bayley, J.* There is nothing in that : both the writ and the recognizance relate back to the first day of the term. Was the plaintiff's writ sued out before or after the service of the allowance of bail ?] That does not appear ; both acts were done on the same day : but which preceded the other is not stated in the affidavits.

BAYLEY, J.—This is a very important point of practice ; for actions on bail bonds may be, and I am fearful too often are, made great engines of oppression. It is not desirable to decide so important a case in the present state of the Court (a), therefore we shall take time for con-

(a) Lord Tenterden, C. J., and Littledale J. were absent.

sideration, and shall consult the other Judges. If the bail was perfected in due time, it is quite clear that the defendant might enter an appearance on the record as on the day on which the writ was returnable; therefore, if the bail in this case had been perfected on the Saturday, the defendant would have been right. Whether he was bound to perfect his bail on that day, or had till the Monday to do so, is the question in the case; and we shall consider further before we decide it. At present, I am by no means satisfied, that if the plaintiff rules the sheriff to bring in the body, he does not thereby waive his original right against the bail.

Cur. adv. vult.

Judgment was afterwards delivered by

BAYLEY, J., who after briefly stating the facts and dates in the case, thus proceeded.—We are all of opinion that the bail in this case were perfected in due time, and consequently that the plaintiff's proceedings upon the bail bond were irregular. The principle upon which we have formed this opinion, was laid down in the case of *Wright v. Walker* (a), where the Court of Common Pleas held, that bail above being put in and justified within four days from the ruling the sheriff to bring in the body, all proceedings upon the bail bond commenced previous to the justification, were irregular, and might be set aside: though if the time for perfecting the bail in that case had been calculated from the day of excepting to them, they would clearly have been too late. The same point was decided in *Blackford v. Hawkins* (b), although, in the reports of that case, the decision is treated as proceeding on the ground that the plaintiff, by ruling the sheriff to bring in the body, makes his election not to proceed upon the bail bond, within the time allowed to the sheriff. We have examined the affidavits in both those cases, and they both appear to be similar in their dates and circum-

(a) 3 Bos. & Pul. 564. (b) 7 J. B. Moore, 600; 1 Bingh. 181.

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stances, and to have been decided upon the same ground. The case of *Bond v. Evans* (a), however, was relied upon in argument as decisive in favour of the plaintiff in this case, and certainly, according to the reports of that case, it does appear distinguishable from those which I have mentioned. But we have examined the affidavits in that case also, from which it appears that no point was made there with reference to the rule for bringing in the body; nor have I, personally, who am represented as delivering the judgment of the Court, any recollection of having said any thing upon that subject. The facts of that case, however, appear to us perfectly consistent both with the decision there, and with our decision in the present case. There was a rule to return the writ there, but it does not appear that there was a rule to bring in the body; consequently, the defendant there was bound, according to all the cases, to justify his bail within four days after exception. The principle, therefore, remains unshaken by that case, and we consider it to be this:—if the plaintiff rules the sheriff to bring in the body, he thereby gives the defendant the same time for justifying his bail, as the sheriff has for bringing in the body; but if the plaintiff does not rule the sheriff to bring in the body, the defendant must justify his bail within four days after exception. We are of opinion that this is the proper general rule to be laid down, and that great inconvenience and mischief would result in country causes from a contrary practice. The ruling the sheriff to bring in the body does not bind the plaintiff down to proceed against the sheriff by attachment, because, after that rule has expired, he may, if he chuses, proceed upon the bail bond. For these reasons, we are of opinion, that the proceedings upon the bail bond in this case are irregular, and consequently, that this rule, for setting aside the judgment “that the defendant has produced the record of appearance,” ought to be discharged.

Rule discharged.

(a) 7 D. & R. 374; 4 B. & C. 864.

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KEATE v. GOLDSTEIN and another.

COMYN had obtained a rule for a *procedendo* in this case, under the following circumstances. The plaintiff had commenced a suit, by foreign attachment, in the Court of the Lord Mayor of London, against the two defendants, which suit one of the defendants had removed by *habeas corpus cum causâ* into this Court. The plaintiff thereupon took out, and served upon both the defendants, a rule for bail, under which the one defendant, who had removed the cause, put in bail for himself only. The question was, whether that one defendant was compellable to put in bail for the other defendant, as well as for himself.

Where one of two defendants removes a cause from the Lord Mayor's Court, a *procedendo* will be awarded, unless bail be put in for both.

Goulburn shewed cause. This is an attempt on the part of the plaintiff, to engraft upon the practice of this Court, the practice of the Court below; which he cannot be allowed to do. According to the practice of the Lord Mayor's Court, proceedings commenced there, whether against the persons of defendants, or against money of their's attached in the hands of a third person, cannot be got rid of, until bail has been put in for all the defendants. But no such advantage arises to the plaintiff from the practice of this Court; and advantages peculiar to proceedings in an inferior Court, cannot follow those proceedings when they are removed into a superior Court. In the present case, great hardship might result from compelling one defendant to put in bail for the other; for the other defendant may be abroad, or under other circumstances which would render it impossible for bail to be procured for him. [*Bayley*, J. We can do no injustice, and inflict no hardship, by merely sending the cause back to the inferior Court.]

Comyn, contra, was stopped by the Court, and—

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PER CURIAM.—We must not allow a defendant, by his own act, and for the sake of the advantage he seeks to derive from it, in removing the suit, to deprive the plaintiff of the advantage which he would have had, if the suit had remained in the Court below (a). The principle of compelling one defendant, under circumstances like these, to put in bail for his co-defendant, is founded in reason and justice (b). At all events we are bound, under such circumstances, to send the cause back to the original jurisdiction.

Rule absolute (c).

(a) So where the privilege of an attorney of King's Bench, to be sued only by bill in this Court, would oust the plaintiff of the benefit of foreign attachment, the Court will not remove a suit in respect of such privilege. *Turbill's case*, 1 Saund. 67.

(b) See *Nicholson v. Bownass*, 3 Price, 263; *Dwerryhouse v.*

Graham, in *notis*, *ibid.* *Petty v. Smith*, 2 J. & Y.

(c) And as to the persons to whom the custom of foreign attachment extends, in respect of the locality of the cause of action, see the order made by Lord Eldon, C. J., on 19th Dec. 1817, in *Traub v. Schmidt*, Manning's *Nisi Prius* Digest, 2d edit. 350.

In re HORSFALL.

7 Nov 528.

An attorney when ordered to deliver up the papers of his client, must deliver up the drafts of deeds for which he has charged and been paid, as well as the deeds themselves.

A JUDGE'S order had been obtained, commanding an attorney of this Court to deliver up to his client, for whom he had transacted certain professional business, the drafts of certain deeds which he had prepared for him in the course of that business. A rule *nisi* was afterwards obtained for setting aside that order, for the purpose of raising the question, whether the attorney, having delivered up the deeds themselves, was compellable to deliver up also the drafts or rough copies of them, which he had prepared, and for which he had charged, and had been paid by his client. Upon the rule being brought on for argument, the Court consulted the Master, who certified that

it was the practice for attorneys under such circumstances to retain the drafts.

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J. Evans, on the part of the client, contended that such a practice could not be supported. *Hughes v. Mayre (a)*, and *Ex parte Grubb (b)*, are decisions at variance with such a practice; but independently of authorities, and upon principle only, it is clearly bad. When an attorney has concluded the business in which he is employed, and is paid his bill, he is bound to give up to his client all papers connected with that business, whether drafts, or rough copies, or of whatever nature they may be. What right can he have to retain possession of drafts for the trouble and expense of drawing which he has charged, and been paid? They are as much the property of the client, as the deeds or documents themselves. The possession of the drafts may, by possibility, enable the attorney, at some future time, to prejudice the interests of the client, by improperly communicating their contents to parties who may be hostile to him; and it would be a dangerous and unjust thing to clothe the attorney with such a power. (Here the Court stopped him).

Tindal, S. G., contra. The Master has certified that in practice it is usual for attorneys to retain possession of papers of this nature. The danger supposed to attend such a practice is merely imaginary, and would apply to the attorney's own books, which must often contain entries which it might be injurious to his former clients to disclose to third persons. The Court will not presume that their officers would be guilty of so flagrant a breach of professional confidence as is suggested on the other side. [Lord *Tenterden*, C. J. The attorney has been paid by his client for drawing these drafts: are they not the property of his client? *Bayley, J.*

(a) 3 T. R. 275.

(b) 5 Taunt. 206.

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What good reason can the attorney have for wishing to retain them?] The client has received the documents themselves, which are all that he can call his property, or that can be of any service to him. The drafts may be very useful to the attorney as precedents.

LORD TENTERDEN, C. J.—He who pays the expenses attending the preparation of the drafts, has, in my opinion, a right to the possession of them. It may be advantageous to the attorney to keep them, but the client is entitled to say whether he chuses or not to allow him that advantage. If he does not, the attorney is bound to deliver them up.

BAYLEY, J.—The attorney may have a right to copy them into his precedent book, if he wishes to make use of them as precedents; but he has no right to keep the drafts themselves, after he has charged and been paid for preparing them.

The rest of the Court concurred.

Rule absolute.

—◆—
 BIGGS v. DWIGHT.

A., the acceptor of two bills for 25*l.*, and 50*l.*, both over due, paid 22*l.* 10*s.* to B., the holder, "on account." B. said, "he wished to have the full amount of the 25*l.* bill."

DECLARATION, in assumpsit, upon two bills of exchange, drawn by *William Webb* upon, and accepted by the defendant, payable to the order of *Webb*, and indorsed by *Webb* to the plaintiff; with the money counts. Plea, non assumpsit, and issue thereon. At the trial before *Gaselee, J.*, at the last Lent assizes (a) for the county of

(a) Counsel for the plaintiff, *Storks, Serjt. Robinson and Monro*; for the de-

A. replied, "he had no more money then, but would pay some more soon." *B.* then indorsed on the 25*l.* bill, "received 22*l.* 10*s.* in part of two bills:"—Held, that *B.* might appropriate the payment to the 25*l.* bill, though void for want of a stamp.

Bucks, the facts of the case, as proved, were in substance as follows :—*Webb*, the drawer of the bills, being indebted to the plaintiff, and being pressed by the plaintiff for payment, applied to the defendant, who, to assist him, agreed to accept the bills in question. They bore date, both, the 7th of February, 1825. One was for 25*l.* at four months, and the other for 50*l.*, at six months, after date. Upon examining the first, it appeared to have been altered in its date, the “7th of February, 1825,” being evidently substituted for the 19th of January, 1824. *Webb*, the drawer, who was examined on the part of the plaintiff, proved that both the bills remained in his possession, undorsed, till some time in February, 1825, when he endorsed them both to the plaintiff, at the same time altering the date of the first as above mentioned : which alteration, he stated, was made in the presence, and with the knowledge, of both the plaintiff and the defendant. In September, 1825, when both the bills were over due, the defendant, in *Webb*’s presence, paid the plaintiff 22*l.* 10*s.* “on account.” The plaintiff then expressed a wish that the full amount of the first bill, for 25*l.*, should be paid ; but the defendant excused himself, saying, “he had no more money about him then, but that he would pay some more in three weeks or a month.” The plaintiff then made the following indorsement on the bill for 25*l.* :—“15th September, 1825. Received in part of two bills, the sum of 22*l.* 10*s.*—*Joseph Biggs*,” which he read over to the defendant, who made no objection to it. Matters thus rested until the spring of the year 1826, when the defendant’s attorney proved that he called upon the plaintiff, and paid him 29*l.* on account of the defendant, at the same time telling him, that the former payment of 22*l.* 10*s.*, must be considered as made entirely on account of the bill of 50*l.*, as the defendant denied all liability upon the bill for 25*l.* The plaintiff replied, that he would accept the money only on condition, that it was paid on account of *both* the bills, to which the witness an-

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swered, "there is the money; you may take it, or not, as you please; but you will take it with my protest, that there is nothing due on the bill for 25*l*." This evidence was objected to for the defendant, as being contradictory of the plaintiff's own written indorsement on the bill for 25*l*., but was received by the learned Judge. The bill for 25*l*. was not produced on that occasion; the plaintiff said that he had it not then with him. It was admitted on both sides, that if the first payment of 22*l*. 10*s*., was to be considered as made on account of the bill for 50*l*., *that*, together with the second payment of 29*l*., would cover the plaintiff's claim upon the bill for 50*l*., including the principal and interest. The learned Judge told the jury he was clearly of opinion, that the bill for 25*l*. having been altered in its date, and not having been re-stamped subsequently to that alteration, was so far void, that the plaintiff could not maintain the action in respect of that bill. The question then was, whether the defendant had paid the 22*l*. 10*s*. specifically on account of the bill for 50*l*.; because, if he had, *that*, together with the subsequent payment of the 29*l*., satisfied the plaintiff's claim, and he could not maintain the action at all. But, if the first payment was *not* so specifically made, the case was altered. If that money was paid generally on account of both the bills, the defendant could not afterwards direct it to be applied specifically to the bill for 50*l*. If it was paid specifically on account of the bill for 25*l*., the defendant could not retract that specific application of the money, and apply it to the bill for 50*l*. Unless the Jury were satisfied, therefore, that the first payment was made specifically on account of the bill for 50*l*., he was of opinion that the plaintiff was entitled to recover. Upon the evidence, it appeared to him that the money was paid generally, on account of both the bills, and, therefore, that the defendant could not now appropriate it to the 50*l*. bill; and the protest made by the attorney at the time of the second payment, could not vary the case, because it could have no bearing upon the first

payment. The Jury, under this direction, found a verdict for the plaintiff.

In Easter term last, a rule *nisi* for a new trial was obtained; upon the ground,—first, that improper evidence had been received; and secondly, that the learned Judge had misdirected the Jury, inasmuch as he ought to have told them that the first payment, not having been made specifically on account of the void bill, but generally on account of both the bills, could not be applied at the subsequent settlement of the account, to any but the good bill.

The case was twice argued, by *Robinson*, for the plaintiff, and *Storks*, Serjeant, for the defendant; first before the puisne Judges, at the Sittings in *Banco*, before this term; and afterwards in this term, before the full Court.

Arguments for the plaintiff. First, if the defendant did not, at the time of paying the 22*l.* 10*s.*, appropriate it specifically to either of the bills, it was competent to the plaintiff to appropriate it to the 25*l.* bill. Secondly, the Jury ought to have found, upon the evidence in the case, that the defendant did so appropriate it. As to the first point;—the general rule of law is, that where the debtor owes money upon several accounts to the same creditor, he is entitled, when he makes a payment, to appropriate it to whichever account he pleases; but, if he then makes no such appropriation, the creditor has the same option (a). Therefore, if the defendant made no specific appropriation of the 22*l.* 10*s.* at the time when he paid it, the plaintiff had the option of appropriating it as he chose. The money was paid *on account*; the indorsement, “received in part of *two* bills,” was read over to the defendant, who made no objection to it, and there-

(a) See *Simon v. Ingham*, 3 D. & R. 249, 52, (2 B. & C. 65), where *Bayley, J.*, thus lays down the rule: “ordinarily, the party who pays in money, has the liberty of applying it specifically to whichever of two accounts he chuses, either the old, or the new; where he makes no selection, but pays the money in generally, the party to whom it is paid becomes entitled to the same liberty, unless the exercise of it is calculated to work injustice.” And see 16 Vin. Abr. Payment, M.

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fore recognised his liability upon both the bills; and as the plaintiff then claimed the full amount of the 25*l.* bill, which was the longest over due of the two, the understanding seems clearly to have been, that the money was to go in liquidation of that bill. *Devaynes v. Noble* (a), which contains a full statement of the law upon this subject, is a direct authority for this mode of appropriation. It was held, in *Bosanquet v. Wray* (b), that a creditor receiving money without any specific appropriation made by the debtor, might be permitted, in a court of law, to ascribe his receipt to the discharge of a prior, and purely equitable debt, and to sue him at law for a subsequent legal demand. The case of *Wright v. Laing* (c) will perhaps be relied on by the other side. There, B. had two demands against A., one upon a legal contract for goods sold, the other upon an usurious contract for money lent. A. made a payment, which was not at the time specifically appropriated by either party to either demand. It was held, that the law would afterwards appropriate that payment to the demand for goods sold, as arising out of a contract recognized by the law, and not to the demand for money lent, which arose out of an unlawful contract. But that case does not bear upon the present; because the ground of the decision there was, that the law would not sanction the appropriation of the payment to a demand arising out of an unlawful transaction. The transaction there was one prohibited by the law; here the transaction was not illegal, and was strictly honest. The test by which to try it is, could the money, if confessedly paid on account of the void bill, have been recovered back? Most certainly it could not; yet in order to support the objection on the other side, the affirmative of that proposition must be maintained. The cases differ materially both in their facts and in their results; for there is a wide difference between a man's fulfilling a contract,

(a) 1 Meriv. 604.

(c) 4 D. & R. 783; 3 B. & C.

(b) 6 Taunt. 597; 2 Marsh. 319. 165.

which is absolutely prohibited by law, and illegal, and his honestly performing a promise, which the law would not compel him to perform, from the performance of which he might escape by an act of dishonesty if he pleased, but which having once completed, he cannot recal. As to the second point, there was evidence in this case which ought to have satisfied the jury, and which ought to have been so left to them, that the money was paid and received on account of the 25*l.* bill. The receipt, indeed, was for money "in part of *two* bills;" but that was explained by the conversation which took place between the parties at the time; for as the plaintiff, when the money was paid, demanded the full amount of the 25*l.* bill, and the defendant answered that he would pay some more in a short time, it is perfectly clear that each was treating the money, just before paid, as paid on account of that bill, and of that bill only. It was said, that that conversation was contradictory of the written indorsement on the bill, and therefore not receivable in evidence; but it was only explanatory of it, and as such was not excluded by the rules of evidence.

Arguments for the defendant. First, the money was paid, in the eye of the law, specifically on account of the good bill only. Secondly, even if it was paid, generally, on account of both bills, the plaintiff was not at liberty, after having received it generally, to appropriate it to either. Thirdly, the parol evidence to shew that the payment was appropriated to one of the bills, was contradictory to the written indorsement, which shewed that it was made on account of both, and therefore inadmissible. As to the first point: the money being paid "on account," and received "in part of *two* bills," can, by law, be applied only to such of those bills as constituted a legal debt; now the only subsisting legal debt arose upon the 50*l.* bill: therefore, the money must be taken to have been paid solely in respect of that bill. But, secondly, admitting the principle, that where the debtor does not appropriate

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the money to one of two accounts, the creditor may, to apply here, and that in such a case the creditor may, according to the decision in *Bosanquet v. Wray* (a), apply the money to a debt purely equitable; still the present plaintiff had no right to appropriate the money to the 25*l.* bill: for as regarded that bill, he had no debt at all, legal or equitable. The defendant was not the original debtor. He became liable merely as the surety of *Webb*; and his liability was confined entirely to the bill; for, independently of the bill, neither the plaintiff nor *Webb* had any demand against him. Then when the bill was rendered void by the alteration of the date, his liability ceased altogether; and as far as respected that bill, the plaintiff had not even an equitable claim against him. Then, even if the money was paid generally, the case of *Wright v. Laing* (b) is decisive to shew that it could not be applied to the void bill. In that case, there was no legal claim for the money lent; here there was no legal claim for the amount of the 25*l.* bill: the cases in principle are not distinguishable. As to the distinction taken on the other side, between a claim from which a man may escape honestly, and one from which he can only escape dishonestly, it cannot be recognized in a court of law; the only question is, had the plaintiff a claim, either at law or in equity, such as he could have enforced against the defendant? and it has been satisfactorily shewn that he had not. Thirdly, evidence of the conversation which took place at the time the money was paid, was not receivable to contradict the plaintiff's own written indorsement on the bill. It has been argued, that the effect of that conversation was not to contradict, but only to explain, the indorsement; but as the indorsement described the money as paid on account of two bills, and the conversation went to shew that it was paid on account of one only, the latter was not explanatory merely, but directly contradictory of the former.

(a) 6 Taunt. 597; 2 Marsh. 319. (b) 4 D. & R. 783; 3 B. & C.

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Lord TENNYSON, C. J.—The learned Judge left it as a question of fact to the jury, whether the money was paid specifically on account of the second, or valid bill, or not, and told them, in effect, that if it was not so appropriated, the plaintiff was entitled to recover. The Jury, by finding a verdict for the plaintiff, must be understood to intimate, that they did not consider the money to have been paid exclusively on account of the second bill, though it does not therefore follow that they considered it to have been paid exclusively on account of the first bill; they may have regarded it as a payment on account generally, in which case the plaintiff was entitled to appropriate it to the first bill; and having done so, had a right to recover upon the second. Then the only question is, whether there was such an inconsistency between the written indorsement and the conversation, as to render evidence of the latter inadmissible, and entitle the defendant to a new trial upon that ground. Looking at all the facts of the case together, I cannot bring my mind to think that there was. At the time when the 22l. 10s. was paid, the first bill was mentioned by the plaintiff, and not objected to by the defendant; and the receipt indorsed upon that bill speaks, therefore, of both the bills; and though, afterwards, an objection was taken to one of the bills, still, I cannot say that the evidence of what passed when the money was paid, and the indorsement was written, was so contradictory of the indorsement, as to render it inadmissible. If that evidence was properly admitted, as it seems to me that it was, I think it has had its natural and proper influence with the jury, and that their verdict may be fairly taken to mean, that both parties, when the money was paid, understood it to be a payment made on account of the first bill. In this view of the case, I am of opinion that there is not sufficient ground for disturbing this verdict, and consequently, that the rule for a new trial ought to be discharged.

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BAYLEY, J.—My mind is not free from doubt in this case. The defendant was liable, only as the acceptor of the bills, for the plaintiff had no claim upon him except in that character; and assuming the first bill to have been void, as I think it was (*a*), the right of appropriation was clearly with the defendant at the time when the money was paid. The defendant paid the money, without saying any thing respecting its appropriation; but the plaintiff, by the receipt which he indorsed on one of the bills, acknowledged that it was paid on account of both the bills: then could he afterwards retract that acknowledgment, and appropriate the money to one? I confess, I think he could not, and therefore I entertain some doubt whether the case ought not to undergo the investigation of another jury.

HOLROYD, J.—Upon the whole, it seems to me that the verdict was right. I doubt whether, under all the circumstances, the first bill was void (*b*); but even admitting that it was, I do not see that there existed any objection in point of law, to the defendant's paying, or the plaintiff's receiving, the whole or part of the sum professed to be secured by it. The intention of the parties, as to the mode and effect of the payment, was a question of fact for the jury, upon the evidence; the whole of the evidence was left to them; and I think their verdict may fairly be taken as finding, that the intention of the parties was to pay and receive the money, specifically on account of the first bill.

LITLEDALE, J.—I am clearly of opinion that the verdict was right. It is perfectly plain that the defendant,

(*a*) And see *Calvert v. Roberts*, 3 Campb. 243.

(*b*) No contract arises out of the creation of an accommodation bill until it comes into the hands of a party entitled to sue upon it.

Downes v. Richardson, 1 D. & R. 332; 5 B. & A. 674. An alteration of the date before negotiation seems, therefore, to be nearly the same thing as an alteration before signature.

at the time when he paid the money, considered himself liable upon the 25*l.* bill; and I think the evidence was sufficient to shew that he made the payment specifically on account of that bill. The plaintiff stated at the time, that he wished the full amount of the 25*l.* bill to be paid, to which the defendant replied, not that the bill was void, and that he considered himself released from all liability upon it, but that he had no more money about him then, but would pay some more in three weeks or a month; and the 50*l.* bill was never mentioned or alluded to by either of them. Under such circumstances, if the larger bill had been void, I think the defendant would have been entitled to treat the money as appropriated specifically to the smaller bill, and as neither of the bills was then treated as void, that he was equally entitled so to appropriate it.

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BAYLEY, J.—It is a satisfaction to me to be now able to state, that the reasons given by my brother *Littledale*, for his opinion, have removed the doubt I entertained, and have satisfied my mind that the verdict was right. I concur, therefore, with the rest of the Court, in thinking that this rule should be discharged.

Rule discharged.

WILLETT v. ARCHER.

HUTCHINSON had obtained a rule calling upon the plaintiff to shew cause why *all* the proceedings in this cause should not be set aside for irregularity, with costs, and why the bail bond should not be delivered up to be cancelled, and ordering that in the mean time proceedings should be stayed; upon an affidavit stating that, a bill of Middlesex was issued by the plaintiff against the defendant on the 11th January, returnable on Tuesday next after eight days of St. Hilary; that an *alias* bill

A term must not intervene between the return of an *alias*, and the issuing of a *pluries*, bill of Middlesex.

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of Middlesex was issued on the 12th February, returnable on Wednesday next after fifteen days of Easter; that a *pluries* bill of Middlesex was issued on the 13th August, returnable on Tuesday next after the morrow of All Souls; and that the *alias* being returnable on Wednesday next after fifteen days of Easter, in Easter term, and the *pluries* not having issued until the 13th August, in Trinity Vacation, one term intervened without any continuance or *pluries* being issued, which deponent was informed and believed was irregular, and contrary to the practice of the Court.

Halcomb shewed cause. *Mr. Tidd*, in his Practice (a), speaking of a latitat, says, "If it be sued out in term time, it is usually tested on the first day of that term, though it may be tested of the preceding one. If sued out in vacation, it should be tested on the last day of the preceding term, for if tested in vacation it is altogether void; and in all continued writs, the *alias* must be tested the day the former was returnable (b)." If, therefore, the process in this case had been a latitat, it is clear that the plaintiff would have been most strictly regular, for then the first writ would have been tested the last day of Michaelmas, returnable the first day of Hilary; the *alias* would have been tested the last (c) day of Hilary, returnable the first day of Easter; and the *pluries* would have been tested the last day of Trinity, returnable the first day of Michaelmas term. That the latter would have been regular, is clear upon the authority of the late case of *Durdon v. Hammond* (d), where the Court said, "if a writ is sued out in Trinity, it may be made returnable at any time in Michaelmas term." A bill of Middlesex, it must be admitted, has no teste; but that circumstance cannot render it necessary to renew that process more

(a) *Tidd*, 150, 8th ed.

(b) *Touchin's case*, 2 Salk. 699.

(c) It should have been tested on the first day of Hilary Term, to comply strictly with the rule laid

down in *Salkeld*.

(d) 2 D. & R. 211; 1 B. & C. 111. But the Court was then speaking with reference to a single writ, not to continued process.

frequently than a *latitat*; if it did, the only effect would be to impose on the plaintiff the expense of issuing writs, whether the defendant can be found or not. At all events, even if the plaintiff has been altogether regular, this rule cannot be made absolute, because it prays for *all* the proceedings to be set aside for irregularity, with costs, and it is perfectly clear that up to the issuing of the *pluries*, the plaintiff's proceedings were strictly regular.

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PER CURIAM.—A term intervened between the return of the *alias* and the issuing of the *pluries*, without any continuance being entered, and in that respect we think the plaintiff was irregular (*a*). It is true that continuances may be entered at any time, being generally mere matter of form, but here they never have been entered. The rule, however, prays too much; because it asks to set aside all the proceedings, all of which with the exception of the *pluries* are regular; or the *pluries latitat* may be good as an original process, rejecting the *pluries* clause as surplusage, though the costs of the former writs might not be allowed on taxation, or the staleness of the affidavit might be a ground for discharging the party from an arrest. The rule, therefore, must be discharged, but without costs.

Rule discharged, without costs.

(*a*) *Parsons v. Lloyd*, 3 Wils. 341. And see *Johnson v. Norton*, 2 Roll. Rep. 442, 3; *Adam's case*, 7 Mod. 17; *Shirly v. Right*, *ib.* 29, 2 Salk. 700, 2 Lord Raym. 775, S. C.; 3 Dow, 22; but a writ of *execution*, returnable two terms after teste, is good, at least as against the sheriff, who has suffered defendant to escape. *Shirly v. Right*, *ubi supra*. But where the party is entitled to plead to writ of execution, as in the case of

an immediate writ of *capias extendi facias*, (which is a writ of execution issuing for the crown, without a previous judgment, on the ground of the alleged insolvency of the debtor), such a return seems to be irregular. Manning, Exchequer Pract. 2d edit., Revenue Branch, 28. So upon a *capias in withernam*, *Adam's case*, *ubi supra*. And see *Dyer*, 175 a; *Bro. Jour., et jour in court*, pl. 71; 1 Roll. Abr. 484, 15; Com. Dig. Pleader, V. 3; *Ante*, 232.

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LLOYD v. HAWKYARD.

Where the service of a writ is irregular, but the defendant, on receiving notice of declaration, says, "It is all right, I will call and settle the debt and costs:" the irregularity is waived.

PATTESON had obtained a rule *nisi* for setting aside the service of the writ in this case for irregularity, with costs, upon the ground that it had been served out of, and beyond the borders of the county, to the sheriff of which it was directed.

J. Jervis shewed cause, and admitted the irregularity, but contended that it had been waived, and he produced an affidavit stating, that when the notice of declaration was served upon the defendant, he accepted it, saying, "it is all right; I will call and settle the debt and costs." This, he contended upon the authority of *Rawes v. Knight (a)*, was a waiver of the previous irregularity. There the service of the process was clearly irregular, but the defendant, after notice of declaration, requested that further proceedings might be stayed, and promised to pay the debt and costs; and it was held that this was a waiver of the irregularity.

PER CURIAM.—It is quite clear, both upon principle, and upon the authority of the case cited, that the defendant has, by his subsequent conduct, waived the previous irregularity in these proceedings. The case cited is not distinguishable from the present; and the principle is a sound and plain one, that where a defendant means to take advantage of an irregularity in point of form in the plaintiff's proceedings, he must act promptly (*b*), and

(a) 7 J. B. Moore, 461; 1 Bingh. 132.

(b) *Hompay v. Kenning*, 2 Chitty, Rep. 236. Where the defendant's attorney wrote a letter to the plaintiff, stating that he would appear and receive a declaration, and offering security for costs, it was

held, that the attorney was bound by his undertaking; and that an irregularity in the service of a *latitat*, which had been served before the day on which it bore *teste*, was waived by such undertaking, although, at the time the letter was written, the irregularity had not

not by lying by lure the plaintiff on to incur increased expenses. This rule must be discharged, and as it was moved with costs, it must be discharged with costs also.

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Rule discharged with costs (a).

been discovered. Anon. 1 Chitty of the defect. *Lowe v. Clarke*, 2 Rep. 129. Such an undertaking Chitty Rep. 240.
 is a waiver of an objection arising (a) And see Tidd, 8th edition, from misnomer, though it does not 562, 3, 4, and the cases there appear that the attorney was aware collected.

CORNFORTH v. LOWCOCK.

CHITTY had obtained a rule, calling upon the plaintiff to shew cause why, upon payment by the defendant of 4*l.* 15*s.*, the amount of the debt for which the action was brought, the proceedings should not be stayed; and why the costs of this application should not be paid by the plaintiff. He produced an affidavit stating that the amount of the debt for which the action was brought, was 4*l.* 15*s.* only, and that at the time of the commencement of the action, the defendant was resident within the jurisdiction of the Birmingham Court of Requests; and suggesting, that no person to whom a debt is owing, not exceeding 5*l.*, and recoverable by the statutes 25 *Geo.* 2, c. 31, and 47 *Geo.* 3, sess. 1, c. 14, from any person resident within the jurisdiction of the Birmingham Court of Requests, can recover costs, if he sue elsewhere than in that Court; wherever the plaintiff may reside, or the cause of action accrue.

In an action for a debt recoverable in a Court of Requests, where the plaintiff might after verdict be deprived of costs, this Court will stay the proceedings on payment of the debt without costs.

Comyn shewed cause. This application, taken altogether, is unprecedented, and cannot be entertained. None of the Court of Requests Acts have ever yet been con-

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strued, or even surmised, to do more, than give the defendant the means of depriving the plaintiff of his costs, *after a verdict* of a certain amount has been found. That is the object expressed in all the acts; and if the further object of enabling the defendant to stay the proceedings upon his own affidavit had been contemplated, that would doubtless have been expressed also. In the absence of express authority for this proceeding, the Court cannot interfere. Besides, the rule, even if it could be sustained at all, cannot be made absolute in its present shape, for it prays too much; it goes the length of asking that the plaintiff shall pay the costs, whereas the utmost the statute does is to protect the defendant from paying them.

PER CURIAM.—The rule certainly asks too much, for we have no authority under this act of parliament to order the plaintiff *to pay* costs; the utmost scope of it is to deprive the plaintiff of the privilege of receiving costs. With respect to the other part of the rule, we see no objection to it. There have been cases upon similar acts of parliament in which motions to stay the proceedings have been granted (*a*), and in the present case it is mercy

(*a*) *Dunster v. Day*, 8 East, 239. After judgment by default, and the damages assessed upon a writ of inquiry, the defendant, under the London Court of Requests Act (39 and 40 Geo. 3, c. 104), may move to stay proceedings on payment of the damages assessed without costs. In *Robinson v. Vickers*, 1 Chit. Rep. 636, note, it is said, that under the London Court of Requests Act, the practice is to stay proceedings on paying the money, without costs, and not to require a suggestion. But where a defendant, living within the jurisdiction of the Westminster Court of Requests, was sued in a superior Court for a debt under

forty shillings, and neglected to take advantage of the stat. 23 Geo. 2, by pleading it in bar, or taking the objection at the trial, the Court would not, after verdict for the plaintiff, suffer a suggestion to be entered, or stay the proceedings. *Taylor v. Blair*, 3 T. R. 452; 1 East, 454, n. If it appear on the face of the declaration, or it is admitted on the part of the plaintiff, or shewn by affidavit, (*Kennard v. Jones*, 4 T. R. 495; *Wellington v. Arters*, 5 T. R. 64; *Melton v. Garment*, 2 N. R. 84; *Anon.* 2 Chitty R. 395), as a matter of fact, and not of mere inference, (*Lowe v. Lowe*, 1 Bingh. 270; 8 J. B. Moore, 220), and not denied

to the plaintiff to grant this motion, because he must proceed, if at all, with the certainty of losing his costs. We think the justice of the case is, that a *stet processus* should be entered, without costs on either side.

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Rule accordingly.

that the debt is under forty shillings, and recoverable in an inferior jurisdiction (*Eames v. Williams*, 1 D. & R. 359), the Court will stay the proceedings as beneath its dignity (2 Inst. 210, 211; 2 Comyns's Rep. 713); the true sense of which phrase has been said to be, that the Court will take care that the administration of justice is not made a heavy oppression, where the interest is so small that it would be only indulging vexation and passion to give the relief. (Per Lord *Eldon*, 10 Ves. 551). But as the plaintiff cannot sue in the County Court unless the whole cause of action have arisen within the county, and, it is said, unless the defendant reside there, the action must be brought in the superior Court, where either of these circumstances fails, although the demand be for less than forty shillings. *Tubb v. Woodward*, 6 T. R. 175; *Busby v. Fearon*, 8 T. R. 235. In the latter case this Court refused to interfere, on the ground that the plaintiffs resided in Middlesex, whereas the Act creating the inferior Court,

limits its jurisdiction to causes where both parties reside within the district. But where the cause of action arises within the jurisdiction of an inferior Court, created by the common law, there appears to be no objection to proceeding there against a non-resident defendant, if he can be served with process within the jurisdiction, or will appear gratis, or upon irregular process. The non-residence is, however, such an obstacle as would justify the plaintiff in suing in the Courts at Westminster. The latter point only is settled in *Welsh v. Troyte*, 2 H. Bla. 29; and though it was there stated, *arguendo*, that an action was not maintainable in the County Court against a non-resident, the references by no means support the position. And see Bro. Abr. *Summons*, pl. 22; *Wheeler v. —*, Freeman, 468; Bro. Abr. *Responder*, pl. 12; Jenk. 57, pl. 7. If an action be brought in the County Court, where that Court has no jurisdiction, the defendant may have a prohibition after judgment. F. N. B. 42 F.

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DRIVER v. HOOD.

7 B. & C. 494

An affidavit of debt, on an award directing money to be paid by defendant to plaintiff *upon demand*, not alleging a demand, is insufficient.

COMYN had obtained a rule, calling upon the plaintiff to shew cause, why the bail-bond executed in this cause should not be delivered up to be cancelled, on the defendant's filing common bail, and why the plaintiff or his attorney should not pay the costs of the application; and ordering that in the mean time proceedings should be stayed. The question intended to be agitated, arose upon the affidavit to hold to bail, which stated—that by an order of *Nisi Prius*, all matters in difference between the parties in a cause in which *Hood* was plaintiff, and *Driver* was defendant, were referred to an arbitrator; that the order of *Nisi Prius* was duly made a rule of Court; that the arbitrator duly made his award, whereby he awarded “that *Hood* had no cause of action against *Driver*, and that there were no damages payable from *Driver* to *Hood* in respect of the matters referred, that *Driver* should upon receipt of the award, pay to the arbitrator's attorneys 17*l.* 17*s.*, the costs of the reference, and that *Hood* should *upon demand* repay to *Driver* that sum;” that *Driver* paid the 17*l.* 17*s.* to the arbitrator's attorneys; that *Driver's* costs in defending the cause were taxed at 7*l.* 7*s.* 6*d.*, which sum, together with the said sum of 17*l.* 17*s.*, amounted to 25*l.* 4*s.* 6*d.*; and that *Hood* was justly and truly indebted to *Driver* in the said sum of 25*l.* 4*s.* 6*d.*, under and by virtue of the said order, rule and award.

Chitty shewed cause. The objection intended to be raised against this affidavit to hold to bail, is, that it does not allege that the sum of 17*l.* 17*s.* was *demanded* by *Driver* of *Hood*. Such an allegation was unnecessary. It was not requisite to *make* any demand, for the award gave *Driver* an immediate and perfect right of action against *Hood* for the money, which was to all intents and purposes money paid by *Driver* to the

use of *Hood*; and, therefore, it was not requisite to *allege* any demand in the affidavit of debt. There is no case expressly in point with the present; but there are decisions similar in principle, and which shew this affidavit to be sufficient. In *Imlay v. Ellefsen (a)*, it was held, that an affidavit of debt under a Judge's order, disclosing circumstances which shewed that the plaintiff had been damnified to such an amount, was sufficient, although it improperly stated that the defendant was *indebted* to that amount, and disclosed the special circumstances. Here, the affidavit discloses circumstances which shew that *Driver* was damnified to the amount sworn to be due to him from *Hood*. So, in *Jenkins v. Law (b)*, it was held, that an affidavit of debt "for damages awarded, and for costs and expenses taxed and allowed," was sufficiently certain, because the Court would infer that the award and taxation were such as would support the action. Here, the affidavit shews that money was awarded under the order of reference, the rule of Court and the award, and alleges that the same money is owing by virtue of the said order, rule and award.

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Comyn, contra, was stopped by the Court, and,

PER CURIAM.—The award made the money payable *upon demand*; therefore, a demand was necessary in order to give the plaintiff a right of action, and the affidavit to hold to bail is bad for not alleging such a demand. This rule, consequently, must be made absolute; but the defendant must undertake not to bring any action for the arrest.

Rule absolute (c).

(a) 2 East, 453.

(b) 1 Bos. & Pul. 365.

(c) And see *Birks v. Trippet*, 1

Saund. 33; and the cases collected in the notes (2) and (b) there.

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BERNASCONI and others, surviving assignees of A. H. CHAMBERS, the elder, and A. H. CHAMBERS, the younger, bankrupts, v. The EARL of GLENGALL.

In an action by assignees of a bankrupt, if the defendant does not give notice to dispute the trading, &c., he cannot dispute the validity of the commission itself.

Where a commission stated that "A. and B., bankers, being traders according to the provisions of the 6 Geo. 4, c. 16, some time since became bankrupts, within the intent and meaning of that statute:"—Held, a sufficient allegation that the bankrupts had traded, and had committed an act of bankruptcy, since the passing, and within the operation of that statute.

DECLARATION in assumpsit by plaintiffs as surviving assignees of the estate and effects of the bankrupts, "*according to the force, form, and effect of the statute made and now in force concerning bankrupts.*" The first count was upon a bill of exchange, dated 8th November, 1826, drawn on defendant by *John Ebers*, payable three months after date, to the order of himself, which bill defendant accepted and made payable when due at *George Hicks's*, 20, Somerset-street. Averment, that *Ebers* indorsed the bill to plaintiffs, and that at maturity the bill was shewn and presented to *Hicks* for payment, and dishonoured. Second count the same, only omitting the special acceptance, and the presentment for payment. Third and fourth counts similar to first and second, but on another bill of exchange for 100*l.* of the same date, with counts for money lent, paid, had and received, and on an account stated. Plea, non-assumpsit and issue thereon. At the trial before Lord *Tenterden*, C. J., at the adjourned sittings, at Westminster, after last Trinity term (*a*), the case on the part of the plaintiffs was this:—the commission of bankrupt against the Messrs. *Chambers* was put in. It bore date 19th November, 1825, and recited that "A. C., the elder, and A. C., the younger, bankers, being traders according to the provisions of an act passed in the 6th year of *Geo. 4*, about ——— since have become bankrupts, within the intent and meaning of the said statute." The assignment to the plaintiffs was then put in. It bore date "2d February, one thousand eight hundred and twenty — 7 *Geo. 4*." *Ebers*, the drawer and indorser of the bills, proved that he

(*a*) Counsel for the plaintiffs, the defendant, *Gurney and Chitty. Scarlett, A. G.*, and ———; for

had given a consideration for the acceptance; and upon his cross examination stated that the Messrs. *Chambers* had ceased to trade as bankers so long ago as November, 1824. No notice had been given on the part of the defendant to dispute the validity of any of the proceedings under the commission; it was nevertheless objected by the defendant's counsel, that as the commission described the bankrupts as "bankers" only, not adding the words "dealers and chapmen," and as it was in evidence that they had ceased to be "bankers," in November, 1824, long before the date of the commission, and long before the act of parliament, under the authority of which that commission issued, came into operation, it was impossible that there could have been either a trading, or an act of bankruptcy by the Messrs. *Chambers*, whereon to found the commission: and *Maggs v. Hunt (a)*, was cited as an authority in point. It was further contended, that under the circumstances above mentioned, it was not competent for the plaintiffs to give evidence of any other trading than in the character of bankers; and in support of that position *Hale v. Small (b)* was referred to.

(a) 4 Bing. 212, where it was held, that as the General Bankrupt Act, 6 Geo. 4, c. 16, which repealed all former bankrupt acts, came into operation 1st September, 1825, a commission sued out 8th September, 1825, against *A. B.*, upon an act of bankruptcy committed by him the July preceding, could not be supported.

(b) 8 Taunt. 730; 3 J. B. Moore, 58, where it was held, that if a bankrupt be described in a commission as a dealer in cattle only, evidence cannot be adduced to prove that he was a dealer in hops. But see the same case more fully stated; 4 J. B. Moore, 415; 2 Brod. & Bing. 25, thus:—Where a commission of bankrupt was

issued against a trader, describing him as "a dealer in cattle, and seeking his trade of living by buying and selling," without the words "dealer and chapman," and at the trial of an action of trespass brought by him against the assignees under the commission, evidence was received of a dealing in hops, and a verdict was found for the defendants as such assignees, which was afterwards set aside, and a new trial granted, on the ground that it might operate as a surprise on the plaintiff:—Held, on a second trial, that such evidence was properly admitted, as the words "dealer in cattle," were descriptive of the person only; and that the ge-

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Lastly, it was objected that as the assignment bore date in eighteen hundred and *twenty*, and the commission did not issue till 1825, the former could have no connection with the latter, and could convey no authority to the plaintiffs to sue as assignees. The Lord Chief Justice overruled all the objections, and the plaintiffs had a verdict, with liberty for the defendant to move to enter a nonsuit, or for a new trial.

Gurney now moved accordingly, relying upon the first and last objections taken at the trial. First, the commission is bad. It describes the bankrupts merely as "bankers, being traders according to the provisions of the 6 *Geo.* 4, c. 16;" it does not state that they traded as bankers, since that act came into operation; nor could it, for the fact was proved to be otherwise; therefore, there was no evidence of a trading under that act. Again, it states that the bankrupts, at some recent but uncertain period, became bankrupts within the intent and meaning of the act; it is too much to infer from so loose a statement that the act of bankruptcy was committed after the act came into operation; for such a statement would be equally well borne out by evidence of acts committed by the parties, such as would have rendered them liable to be made bankrupts under the new act, years before it came into operation: therefore, there was no evidence of an act of bankruptcy within that act. Secondly, the assignment is a nullity, and conveyed no title to the plaintiffs as assignees. It was dated in 1820, and therefore could not possibly apply to a commission sued out in 1825. [*Lord Tenterden*, C. J. It was dated in *eighteen hundred and twenty*

neral statement that the bankrupt got his living by "buying and selling," was sufficient to admit evidence of any trading whatever. Upon the same principle it would seem that the words

in the commission in this case, "being traders according to the provisions of the statute," formed a sufficiently general statement to render evidence of any species of trading admissible.

——, in words at full length, with a blank after the word “twenty;” which is not inconsistent with the date of the year of the reign, following, 7 Geo. 4. *Bayley J.* The title of the plaintiffs as assignees could not properly be brought in question; they had acted as assignees, and the bills were indorsed to them; they had no occasion to prove themselves assignees at all. Lord *Tenterden, C. J.* The defendant gave no notice to dispute the trading or the act of bankruptcy, pursuant to the 90th section of the act, he was, therefore, not entitled to call upon the plaintiffs to prove them]. That section does not make the depositions *conclusive* evidence of the trading and act of bankruptcy, as the 92d section, under different circumstances, does; it only provides that no proof shall be required; which does not preclude the defendant from disputing the validity of the commission itself.

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LORD TENTERDEN, C. J.—The 90th section of the act provides, that unless notice of an intention to dispute the trading, &c., be given, no proof of them shall be required. I now really doubt whether I was right in allowing the defendant's counsel to shew that the bankrupts had ceased to trade as bankers in 1824, because the intention of the statute seems perfectly plain, to make the production and proof of the commission and assignment sufficient evidence of the trading, &c., where no notice of an intention to dispute them has been given. But the question is, whether, looking at this commission now, the Court can say that it is void. It is a commission under the great seal, and it recites that the parties to whom it applies, became bankrupts within the intent and meaning of the General Bankrupt Act then in force. Such an allegation can only import that they committed an act of bankruptcy since the passing of that act; because it would be impossible that they should so become bankrupts, unless that had been the

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case. We cannot presume the fact to be otherwise, seeing it, as we do, asserted and attested by the affixing the great seal to the commission; and if such a question can be raised at all, the proper mode of raising it would be by an application to the Lord Chancellor. The use of the word "bankers" only in the commission, without the words "dealers and chapmen," upon which an objection has been founded, presents in reality no difficulty at all, because that word is descriptive not of the trade of the bankrupts, but of their persons merely. The commission is awarded against them as "being traders according to the provisions of the statute," which is a perfectly sufficient allegation of their being traders (a).

BAYLEY, J.—I think there is quite enough upon the face of the commission to shew that the bankrupts were traders, and had committed an act of bankruptcy, within the meaning and operation of the 6 Geo. 4, c. 16. But, at all events, the Lord Chancellor, when he sealed the commission, must have been satisfied of that fact, and we cannot enter into any inquiry upon the subject.

The other Judges concurred.

Rule refused.

(a) *Vide ante*, 327, note (b).

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After the first day of term, a commission of bankrupt

issues against A. In the course of the same term B. signs judgment against A. in an action of trover:—Held, that the judgment is a debt provable under the commission, and that A.'s certificate is a bar to a *scire facias*.

SCIRE facias to revive a judgment. Previously to Easter term, 1824, which began on the 5th of May, the plaintiff had sued the defendant in an action of trover.

On the 13th of May, a commission of bankrupt was sued out against the defendant, under which he afterwards obtained his certificate, and on the 19th of May, the plaintiff obtained judgment in the action, upon which he proceeded by *scire facias*. The defendant appeared to the *scire facias*, and pleaded his bankruptcy in bar, upon which plea the plaintiff joined issue; and at the trial a verdict was found for the plaintiff, with liberty to the defendant to move to set that verdict aside, and to enter one in his own favour. A rule *nisi* was afterwards obtained accordingly, against which

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Scarlett, A. G., and *Chitty*, shewed cause. The question is, whether the judgment obtained by the plaintiff against the defendant in the action of trover, constituted a debt provable under the commission issued against the latter, within the meaning of the statute 6 Geo. 4, c. 16, s. 47 (a); because if it did, the certificate is a bar to this action. The only ground on which it can be contended that the amount for which the judgment was recovered was a debt provable under the commission, is, that the judgment related back to the first day of the term in which it was signed, and must, therefore, be considered as having been signed before the commission issued. Now, though it is perhaps too late to dispute that the judgment does in some instances relate back to the first day of the term in which it is signed, still, that is by a mere fiction of law, which is never permitted to alter the situation of the parties with respect to their legal rights, or to work injustice. Here the judgment, in fact, was signed on the 19th of May, and the commission issued on

(a) Which provides, "that every person with whom any bankrupt shall have really and *bona fide* contracted any debt or demand, before the issuing of the commission against him, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be admit

ted to prove the same, and be a creditor under such commission, as if no such act of bankruptcy had been committed; provided such person had not, at the time the same was contracted, notice of any act of bankruptcy by such bankrupt committed."

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the 13th; the commission, therefore, in reality had the priority, and the judgment did not constitute a debt provable under it. *Ex parte Birch* (a) will probably be relied on by the other side. It was there held that a judgment for damages and costs in *assumpsit*, was a debt contracted within the meaning of the 46 Geo. 3, c. 136, s. 2 (b), and provable under a bankrupt's commission, though final judgment was not entered up until after the commission issued. But there the judgment was in *assumpsit*; here it ~~is~~ in *tort*; a most important distinction; and that decision with respect to a judgment in *assumpsit* cannot be cited as an authority for a similar decision with respect to a judgment in *tort* (c). In *Buss v. Gil-*

(a) 7 D. & R. 436; 4 B. & C. 880.

(b) Which provides, "that in all cases of commissions of bankruptcy, all and every person with whom the bankrupt shall have really and *bonâ fide* contracted any debt before the date and suing forth of such commission, which, if contracted before any act of bankruptcy committed, might have been proved under such commission, shall, notwithstanding any prior act of bankruptcy may have been committed by the bankrupt, be admitted to prove such debt, and to stand and be a creditor under such commission to all intents and purposes whatever, in like manner as if no such prior act of bankruptcy had been committed by such bankrupt."

(c) But see *Robinson v. Vale*, 4 D. & R. 430; 2 B. & C. 762. There plaintiff recovered damages and costs against defendant in an action of *trespass*, and signed final judgment on the 29th January. On the 23d of that month defendant committed an act of bank-

ruptcy, and a commission issued against him on the 31st of the same month, and on the 3rd May, he obtained his certificate. It was held, that the damages and costs were a *bonâ fide* debt within the meaning of 46 Geo. 3, c. 135, s. 2, and provable under defendant's commission; and he having been taken on a *ca. sa.* for the damages and costs, the court discharged him out of custody. There, the judgment was signed before the commission issued, but after the act of bankruptcy was committed; here the judgment was signed after the commission issued, as well, of course, as after the act of bankruptcy was committed. The court were clearly of opinion that a judgment, *even in an action of tort*, is a debt within the meaning of the statute, and provable under the defendant's commission, although the final judgment be not signed until after the act of bankruptcy committed. And the grounds of that opinion were explained by Bayley, J., who said, "the judgment was the con-

bert (a), it was held, that a debt due on a judgment, signed in an action for damages, after the act of bankruptcy committed by the defendant, and a commission issued thereon, was not discharged by the certificate, though the verdict was obtained before the bankruptcy; and in *ex parte Charles (b)*, that where a defendant committed an act of bankruptcy, between the time of a verdict *in case* for a breach of promise of marriage, and final judgment, the damages were not a provable debt. [*Bayley, J.* That case does not bear upon the present. The real point there decided was this:—The plaintiff had recovered more than 100*l.* damages in an action for a breach of promise of marriage. Between verdict and judgment, the defendant committed an act of bankruptcy. It was held that the debt due upon the judgment, after it was entered up, was not a good petitioning creditor's debt whereon to found a commission against the defendant. Besides, the dates in that case were materially different from those in the present; for the verdict was on the 5th of December, the act of bankruptcy on the 25th of December, and the judgment was not entered up until the 31st of January, far in the ensuing term.] In the very recent case of *Bire v. Moreau (c)*, the defendant obtained a verdict in July. A commission of bankrupt issued against the plaintiff in August. Judg-

sequence of a tort committed by the bankrupt before the act of bankruptcy, and therefore the debt by relation back to the cause of action, was a debt existing previous to the date of the act of bankruptcy and commission. As such it was clearly provable within the meaning of the statute, the object of which was to protect the bankrupt's estate against the proof of dishonest or fictitious claims, between the date of the act of bankruptcy, and the suing forth of the commission." *So, in Buxton*

v. White, 7 Price 209, where in an action for damages, *on a tort*, a verdict was taken subject to the award of an arbitrator, and the defendant became bankrupt between the verdict and the making an award; it was held that execution could not be sued out on the judgment, either for the damages or costs, because the plaintiff might have proved the damages recovered, under the commission.

(a) 2 M. & S. 70.

(b) 14 East, 197.

(c) 4 Bingh. 57.

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ment was obtained against him, and a certificate under the commission for him, in the following Michaelmas term. And it was held that he was liable to an execution for the costs, notwithstanding the 6 Geo. 4, c. 16, s. 56 (a).

[*Bayley, J.* That was a very different case from the present. The question there was respecting the costs only, and turned upon a different clause of the act of parliament (b)].

Campbell, contrd., was stopped by the Court.

Lord TENDERDEN, C. J.—I am decidedly of opinion that we ought to make this rule absolute. At common law, every judgment has relation back to the first day of the term in which it is entered up. The rule applies in the present case, and its application to the present

(a) Which provides, “that if any bankrupt shall, before the issuing the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or, if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not dis-

turbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed.”

(b) Sect. 58, which provides, “that if any plaintiff, in any action at law, or suit in equity, or petitioner in bankruptcy or lunacy, shall have obtained any judgment, decree, or order, against any person who shall *thereafter* become bankrupt, for any debt or demand in respect of which such plaintiff or petitioner *shall prove under the commission*, such plaintiff or petitioner shall also be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy.”

case will work no injustice, because though the effect of it is, that the defendant's certificate is a bar to this action, the plaintiff may prove his debt under the commission.

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BAYLEY, J.—I think it is impossible to distinguish this case in principle from that of *Ex parte Birch*, and I am quite satisfied of the propriety of that decision.

The other Judges concurred.

Rule absolute for entering a verdict for the defendant.

FLETCHER v. HEATH and others.

7 Nov 517
THIS was an action of trover for twenty bales of silk, and twenty warrants for the delivery of the same. Plea, not guilty, and issue thereon. At the trial at the London sittings, before the Lord Chief Justice (a), the jury found a verdict for the plaintiff, subject to the opinion of the Court upon the following case.

In February, 1825, *John Billinge*, a silk broker, purchased for the plaintiff twenty-four bales of silk, lying in the warehouse of the East India Company. The plaintiff paid for the silks when due, and received twenty-four warrants for the delivery of them in the usual form. On the 7th June, 1825, the plaintiff sent the twenty-four warrants

(a) Counsel for the plaintiff, for the defendants, *Gurney*, and *Denman*, C. S., and *Campbell*; Reader.

for the purpose of taking up his own acceptances, but which he applied to his own use, and afterwards pledged the warrants with C. In trover for the warrants by A. against C.:—Held, that by sect. 8, of 6 Geo. 4, c. 94, B. not having paid his own acceptances, had no lien upon the warrants which he could transfer to C.; and that therefore C. had no right to detain them as against A.

A. purchased and paid for East India silks, the warrants for which he sent to B., his broker, with bills to nearly their value, drawn upon B., which B. accepted. B. did not pay his acceptances when due, but received from A. the acceptances of A. to nearly the same amount,

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to *Billinge*, inclosed in a letter, of which the following is a copy.

"London, 7th June, 1825. Mr. *John Billinge*. I inclose you 24 East India warrants of silk, with a statement of costs, amounting to 3761*l.* 13*s.* 7*d.* Upon these I have drawn upon you two bills, 1500*l.*, and 1550*l.* 10*s.*, at three months' date from the 6th instant, which please to accept to stand against the proceeds of said silk when sold. *M. Fletcher*."

Billinge accepted the two bills above mentioned, amounting to 3050*l.* 10*s.*, and returned them to the plaintiffs. *Billinge* could not sell any of the silks before the bills became due. The plaintiff promised to provide funds to pay the bills, but a few days before they fell due, he said to *Billinge* that it would be inconvenient for him to do so; that *Billinge* should draw bills upon him which he would accept; and that *Billinge* should get them discounted and pay his own acceptances. In consequence, *Billinge* drew upon the plaintiff four bills of exchange payable to his own order, one dated 3d September, 1825, for 600*l.* at two months; another of the same date for 638*l.* at three months; another dated 8th September, 1825, for 700*l.* at three months; another dated 9th September, 1825, for 700*l.* at four months, amounting in the aggregate to 2638*l.* These bills were accepted by the plaintiff and delivered to *Billinge*, who promised to get them discounted, and to take up his own acceptances. On the 5th September he discounted the bill for 638*l.*, but on the 9th September, when his afore-said acceptances became due, and were paid as after mentioned, he had not discounted any of the others. On that day he went to the counting-house of the defendants, shewed them the plaintiff's letter of the 7th June, and asked to borrow 3,000*l.* upon the security of the warrants, to enable him to pay his said acceptances. He

did not mention to the defendants the last mentioned bills so accepted by the plaintiff. The defendants advanced him 3000*l.* on the credit of the warrants, which he left with them, together with the aforesaid letter of the 7th June, 1825. This money he immediately paid into his banker's, where his acceptances were made payable, and without it the bankers had not funds to pay them. In this manner the acceptances were paid on that day. When *Billinge* borrowed the 3,000*l.*, and left the warrants with the defendants, he had not paid any of his acceptances. *Billinge* had no authority from the plaintiff to borrow the said sum of 3000*l.* from the defendants. On the 26th September, *Billinge* carried to the defendants, bills for 3366*l.*, desiring them to discount those bills for him, to repay themselves the 3,000*l.* they had advanced to him and interest, and to pay him the balance. They did so, and paid him a balance for 269*l.* 7*s.* 1*d.* All the bills accepted by the plaintiff, *Billinge* discounted, and applied the proceeds to his own use, but carrying the amount to the plaintiff's credit in their account current. He sold one bale of the silk on the 12th September, and three more on the 2d November. The defendants gave him up the four warrants, and have retained the others in their possession. *Billinge* did not pay the proceeds of the four bales, which he sold to the plaintiff, but he credited his account with the amount. The plaintiff paid all the bills accepted by him as they became due. On the 10th October, 1825, *Billinge* drew upon the plaintiff another bill of exchange, payable to his own order for 400*l.*, at three months, which was also accepted by the plaintiff, and which *Billinge* applied to his own use. A third set of bills was drawn by the plaintiff on *Billinge*, and accepted by him; one dated 1st December, 1825, for 700*l.* at three months; another dated 8th December, 1825, for 800*l.* at three months; another dated 29th December, 1825, for 500*l.* at three

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months; and another dated 2d January, 1826, for 600*l.* at three months. *Billinge* stopped payment on the 17th January, 1286, and a commission of bankrupt was soon issued against him. Till then, the plaintiff knew nothing of *Billinge's* having borrowed money from the defendants; or having deposited the warrants with them. *Billinge*, when he stopped payment, was, and still is, indebted to the plaintiff in the sum of 494*l.* The plaintiff negotiated the third set of bills accepted by *Billinge*, but he took them up when due, and they have been no charge upon *Billinge's* estate. *Billinge* was not indebted to the defendants when he deposited the warrants with them, but he was indebted to them when he stopped payment to the amount of 4000*l.* and upwards. The bills for 3366*l.*, delivered by *Billinge* to the defendants on the 26th September, produced to the defendants 2327*l.* Some of them were dishonoured, and remain in their hands, making a deficit of 1039*l.* besides interest. Before the commencement of the action, the warrants were demanded on behalf of the plaintiff from the defendants, who refused to deliver them up, claiming a lien upon them for the balance due to them from *Billinge*.

The questions for the opinion of the Court, are, first, whether the defendants have any lien upon the warrants; and, secondly, if they have any, to what amount? The verdict to stand, or a nonsuit to be entered, as the Court shall direct. If the verdict is to stand, the same to be for the amount of the damages in the declaration, to be reduced to one shilling on delivery by the defendants of the warrants, or payment of the net price raised by the sale of such of them as shall be previously sold by the defendants, with the consent of the plaintiff.

Campbell, for the plaintiff. First, the defendants had no lien whatever upon the warrants; secondly, if they

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had any, at most it extended only to the sum of 412*l.* 10*s.*, the difference between *Billinge's* acceptances for 3050*l.* 10*s.*, and the plaintiff's acceptances for 2638*l.*, the latter of which were given for the purpose of taking up the former, though they were not so applied. The justice of the case is clearly with the plaintiff, for he had bought and paid for the silks, and they were afterwards pledged by his agent without his knowledge or authority; but it is to be contended that the law of the case is with the defendants, and the late statute of 6 Geo. 4, c. 94, s. 5, is to be relied upon as furnishing that law. The object of that section, as stated in the margin of the printed act, is to define "what interest persons accepting and taking goods, &c., in pledge from unknown agents may acquire," and the enactment of it is this:—"that it shall be lawful for any person to accept and take any such (a), goods, wares, or merchandize, or any such document (b), in deposit or pledge from any factor or agent, notwithstanding such person shall have notice that the person making such deposit or pledge is a factor or agent; but in that case, such person shall acquire no further or other right, title, or interest in, or upon, or to the said goods, wares, or merchandize, or document for the delivery thereof, than was possessed, or could or might have been enforced by the factor or agent, at the time of such deposit or pledge as a security; but such person shall and may acquire, possess and enforce such right, title, or interest as was possessed and might have been enforced by such factor, or agent, at the time of such deposit or pledge." The defendants,

(a) i. e. Goods, wares, or merchandize, entrusted to any person for the purpose of consignment or of sale, and shipped by such person in his own name, or goods, wares, or merchandize, shipped by one person in the name of

another; sect. 1.

(b) i. e. Any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, wharfinger's certificate, or warrant, or order for delivery of goods; sect. 2.

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therefore, could acquire no further right or title to the warrants by the pledge made of them by *Billinge*, than *Billinge* himself possessed or might have enforced; and then the simple question is, what right or title to the warrants did *Billinge* possess, or could he have enforced, on the 10th September, when he pledged them to the defendants? It is confidently submitted that he had at that time no right or title to, or in the more generally accepted term, no lien whatever upon, the warrants. He had advanced no money upon them, he had merely accepted bills to the amount of 3050*l.* 10*s.*, against the proceeds of the silks; and the plaintiff had subsequently accepted bills to the amount of 2338*l.* for the purpose of taking up *Billinge's* bills: so that the utmost extent of *Billinge's* lien, under any circumstances, was 412*l.* 10*s.* the difference between the two sets of bills. But even that, if it had once existed, was gone before the pledge was made; because *Billinge* did not take up his own acceptances with the plaintiff's bills, but on the contrary discounted one of the latter, a bill of 638*l.*, and applied the money to his own use; so that his claim for the 412*l.* 10*s.* was at an end, and the plaintiff had a counter claim upon him for 225*l.* 10*s.* upon that part of the transaction. But, even supposing that *Billinge* had on the 10th September a lien upon the warrants to the amount of 412*l.* 10*s.*, which lien he on that day transferred to the defendants by pledging the warrants to them, still the subsequent transaction of the 26th of September discharged that lien, both as against the defendants and *Billinge*; for on that day *Billinge* repaid the defendants the 300*l.* which they had advanced upon the security of the warrants, and the plaintiff might then instantly have insisted upon the warrants being delivered up to him. It is true that the defendants received back their original loan of 3000*l.* by means of discounting other bills for *Billinge* of a large amount, and paying him the balance; but that was not a fresh loan on account

of the warrants; that was an actual sale of those bills by *Billinge* to the defendants; and though some of those bills were afterwards dishonoured, that circumstance did not affect the plaintiff; it only constituted a new debt between the defendants and *Billinge*. But even going one step further, and assuming that the original lien subsisted, notwithstanding the transaction of the 26th of September, still it was entirely extinguished by what took place between *Billinge* and the plaintiff in the following December, for the plaintiff then drew bills upon *Billinge* to the amount of 2000*l.*, which *Billinge* accepted, and he shortly afterwards stopped payment, being indebted to the plaintiff in the sum of 494*l.* Looking at these facts altogether, can it be contended that such a pledge made by an agent ought to be binding upon his principal? Surely not; the most grievous injustice would result from such a decision. It is submitted, therefore, first, that the defendants have no lien at all upon the warrants; and, secondly, at all events, that they have a lien only to the extent of 412*l.* 10*s.*, the claim which *Billinge* is supposed to have had upon the plaintiff at the period of the pledge. In either view of the case the plaintiff is entitled to recover. In the first, because then there is no defence to the action. In the second, for two reasons:—first, because the defendants have detained property far exceeding in value the amount of their lien, and have thereby been guilty of a conversion of the surplus; and, secondly, because they have varied the ground upon which they claimed to retain that property; for their first claim was in respect of a debt owing by the plaintiff, and their present claim is in respect of a debt owing by *Billinge*: and that is a waiver of the lien *in toto*. *Boardman v. Sill (a)*.

Reader, contra. First, the defendants have not waived their lien, be the extent of that lien what it may. The

(a) 1 Campb. 410, n. And see *Thompson v. Trail*, 6 B. & C. 26.

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
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principle laid down by Lord *Ellenborough*, in *Boardman v. Sill* cannot be impugned ; nor need it on the part of the present defendants. The point there decided was, that if a person, having a lien upon goods for warehouse rent, when they are demanded of him, claims to retain them upon a different ground, (in that case, that the goods were his own property,) *and does not make any mention of the lien*, trover may be maintained against him, without evidence of a tender having been made to him in respect of his lien. It requires no argument to shew how widely and essentially that case differs from the present; the mere statement of it is enough to dismiss the point raised upon it. Secondly, it is perfectly immaterial, so far as the maintenance of the action is concerned, to what extent the defendant's lien prevailed. If they have any lien at all, however limited, that is a good answer to this action, because the plaintiff has made no tender in respect of that lien, which he was bound to do. Then, thirdly, which is indeed the only point in the case, had the defendants any lien at all? If they had, the plaintiff must be nonsuited; and that they had, a short review of the facts will clearly and satisfactorily establish. It has been said that the justice of the case is with the plaintiff, because he bought and paid for goods which were afterwards pledged by his agent, without his knowledge or authority; but it is at least equally with the defendants, for they have advanced their money *bonâ fide* upon the faith of a security, which is now attempted to be wrested from them, without repaying them their advances. The language used by the plaintiff in his letter to *Billings* of the 7th of June, clearly shews that he intended to give *Billings* a lien upon the warrants, and that lien was, under the new law, transferrable by *Billings* to the defendants. He says, "I inclose you twenty-four warrants of silks, upon which I have drawn bills, which please to accept, to stand against the proceeds of the silk when sold." The plaintiff, therefore, expressly

charged the warrants with the amount of the bills which he then drew, and *Billinge* pledged them, so charged to the defendants; which by law he was entitled to do. The defendants, in accepting the warrants, acted perfectly *bonâ fide*, for they had no reason throughout the transaction to entertain any suspicion of *Billinge*; they trusted the plaintiff, not *Billinge*; they advanced their money upon the plaintiff's security, and the law transferred to them the same lien upon the warrants as *Billinge* possessed at the time. Then what lien did *Billinge* then possess? The pledge was on the 10th of September. *Billinge's* acceptances fell due on the 9th. On the 8th, the plaintiff gave him fresh bills, which left a balance of 412*l.* 10*s.* due to *Billinge*; and, therefore, to that extent at least, *Billinge* had a lien, which he was capable of transferring to the defendants. Then it is impossible for the plaintiff to maintain this action, because he has omitted to tender to the defendants that sum of 412*l.* 10*s.* The defendants did not waive their lien by discounting the second set of bills for *Billinge*; for that was not a sale of those bills by *Billinge* to them, but a new loan upon the old security; and as those bills were never paid, they could have no effect in altering the relative claims and liabilities of the parties. It is said the warrants might at that time have been demanded back by the plaintiff; but if they might, they never in fact were so; they were left by him in the hands of the defendants as continuing securities, and the possession of them never having been given up, the lien upon them never was extinguished. The subsequent arrangement made between *Billinge* and the plaintiff could not operate in any manner against the defendants; for the plaintiff being then indebted to *Billinge* upon a balance of accounts, could not have demanded the delivery of the warrants from him, because he had then a lien upon them for that balance, which lien had passed to, and was subsisting in the defendants.

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The case was argued in Trinity term last, when the Court took time for consideration; and in the course of the present term, judgment was delivered by

Lord TENTERDEN, C. J., who after briefly recapitulating the facts of the case, thus proceeded. Upon these facts we are all of opinion that the plaintiff is entitled to recover. At common law, and before the passing of the late statute 6 Geo. 4, c. 94, it is perfectly clear that the defendants would have had no lien upon the warrants; but it was contended that under the fifth section of that statute they could, and did acquire a lien upon them, at least to the amount of 412l. 10s., the sum due from the plaintiff to *Billinge* at the time the latter pledged the warrants with the defendants. But that clause provides, that the pawnee of goods pledged by an agent, shall acquire no further right, title, or interest in the goods, than was possessed, or could have been enforced by such agent at the time of the pledge; therefore, the question is, what right, title, or interest, *Billinge* possessed in these warrants, or could have enforced, at the time he pledged them with the defendants. The plaintiff in his letter to *Billinge* of the 7th of June, incloses the warrants to him, and states that upon those warrants he has drawn bills upon him; and those bills *Billinge* accordingly accepted. But those bills were never paid. Now the 6th section of the statute, which provides, that the preceding section which declares that agents fraudulently pledging the goods of their principals shall be deemed guilty of a misdemeanour, shall not extend to cases in which the agent has not made the goods a security for any sum beyond the extent of his own lien, provides that acceptances of bills by an agent drawn by his principal, shall not create a lien, so as to excuse the pledge, unless the bills are paid when due. It follows from that provision, that *Billinge* the broker had no lien upon the warrants at the time when he pledged them, and conse-

quently that the defendants could derive no lien from him, and have no right to detain the warrants as against the plaintiff, the principal. The result is, that the judgment of the Court must be for the plaintiff.

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Judgment for the Plaintiff.

The KING, at the relation of JAMES TILBY v. HEADLEY and others, burgesses of the borough of Devizes, in the county of Wilts.

IN Trinity Term last, *Campbell* obtained a rule calling upon the defendants to shew cause, why an information, in the nature of a *quo warranto*, should not be exhibited against them, to shew by what authority they severally exercised the office of chief or capital burgesses, of the borough of Devizes, in the county of Wilts, from the 1st day of August, 1825, to the 8th of October in the same year; and by what authority they now claim to exercise that office within the said borough.

This rule was obtained on two affidavits of the relator, the first of which contained the following allegations:—The borough of Devizes is a corporation by prescription, with twelve chief-burgesses-councillors, or aldermen, and twenty-four chief-burgesses. 10th July, 3 Jac. 1, a charter was granted to the mayor and burgesses of the

A charter granted to a corporation by prescription, recognizes the existence of a body consisting of thirty-six chief burgesses, and directs that the mayor, recorder, and the chief burgesses, being the common council of the said borough, of which chief burgesses

some are called, known, or distinguished, by the name and distinction of chief-burgesses-councillors, of the borough aforesaid, or the greater part of them, shall have power and authority to choose, nominate, and appoint, a mayor, &c., and the mayor is to be chosen out of the chief-burgesses-councillors. It creates a court of record within the borough, which is to be held before the mayor, recorder, and the chief-burgesses-councillors, before whom also the sessions of the peace are appointed to be held, and of whom, the justices for the borough are to be chosen, and by whom, fines are to be imposed on persons refusing to take upon themselves offices to which they have been elected. When the common council are assembled in their elective capacity, it is sufficient, if any fifteen chief burgesses are present; and it is not necessary that the presence of a majority of the twelve chief burgesses councillors, and the presence of a majority of the twenty-four chief burgesses, not being councillors, should concur.

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said borough and their successors, by which, after reciting that the borough of Devizes, in the county of Wilts, was an ancient and populous borough, and that the mayor and burgesses of the same borough had, time out of mind within the said borough, used and enjoyed divers liberties, &c., as well by the charters of many of the king's progenitors, as also by means of divers prescriptions and customs anciently used in the same borough; and that the then mayor and burgesses had humbly besought his majesty to exhibit and extend to them his grace and kingly munificence; and that his said majesty, for the rule, government, and improvement of the said borough, was willing to alter and change the time and manner of choosing the mayor of the said borough, and did vouchsafe to explain and confirm other grants, liberties, franchises, immunities, and pre-eminences, as well by the charters of many of his progenitors and predecessors to the same mayor and burgesses of the borough aforesaid and their predecessors, as also by means of divers prescriptions and customs, theretofore anciently used in the said borough, and to give and grant other liberties and ordinances, profitable and convenient, for the good ruling of the borough aforesaid; his said majesty willed that from thenceforth for ever thereafter there should be continually in the same borough one certain and undoubted manner for and concerning the keeping of his peace; and for the rule and government of his people there, did allow, ratify, and confirm to the mayor and burgesses of the borough aforesaid and their successors, for ever, all and singular gifts, grants, liberties, &c.; and further for the better state of the said borough of Devizes, and of the burgesses and inhabitants of the same borough, and for the better government thereof, and to avoid from thenceforth all such doubts, ambiguities, and questions, as theretofore had arisen, or thereafter by any means should happen to arise, of or concerning the election of the mayor of the said borough, or the government of the same borough, his said majesty

did give and grant to the said mayor, &c., that the mayor and common clerk, called the town clerk, of the said borough, together with thirty and six burgesses of the same borough, being the common council of the same borough (a), for the time being, or the greater part of them from time to time, and at all times thereafter should have power yearly, and every year, on the Friday next after the Feast of Pentecost, of choosing, nominating, and assigning, and that they should and might choose, nominate, and assign one honest and discreet man of the number of twelve chief-burgesses-councillors of the said borough, who should be mayor of the said borough for one whole year, next ensuing (b); who before he should be admitted to exercise the same office, that is to say, on the Feast of St. Michael, the archangel, yearly next after his election, should take his corporal oath well and truly to execute the same office, in all things concerning it, before his last predecessor, being next before mayor of the borough aforesaid, and the town clerk of the same borough, in the presence of the aforesaid thirty and six burgesses and other burgesses of the same borough, for the time being, or the greater part of them (c); and after such oath so taken, he should and might execute the office of mayor of the same borough for one whole year then next following; And that the mayor and town clerk of the borough aforesaid, for the time being, and thirty-six chief burgesses of the same borough, for the time being, or the greater part of them, should have the nomination, and election, and appointing, and that they should and might nominate, appoint, and elect, all and all manner of such and the like officers and ministers (d) whatsoever, thereafter to serve within the same borough, as theretofore had had, held, enjoyed, and used any offices within the same borough, at such places within the borough aforesaid, and at such time and times, as anciently theretofore had been used within the borough aforesaid,

(a) *Post*, 376. (b) *Post*, 370. (c) *Post*, 370. (d) *Post*, 370.

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and also of taking thereafter all and singular free burgesses of the borough aforesaid, into the number of free burgesses of the same borough (a); and that such officers and ministers and the aforesaid free burgesses into the number of free burgesses of the same borough to be admitted, should be sworn before the mayor and town clerk of the same borough, and the chief-burgesses of the same borough, for the time being, or the greater part of them, severally to execute their offices faithfully before they should be admitted to such offices within the borough aforesaid, or to the places of free burgesses of the same borough (b); And if it should happen that the mayor of the borough aforesaid, for the time being, at any time within a year after he should so as aforesaid be chosen to the office of mayor of the same borough, should die or be removed from his office, then and so often it should and might be lawful to and for the aforesaid town clerk and thirty-six chief-burgesses of the borough aforesaid, or the greater part of them for the time being, within fifteen days next after such death or removal of the said mayor, in the Guildhall of the borough aforesaid, or in any other convenient place within the same borough, to meet and one other of the aforesaid twelve burgesses councillors of the same borough, to elect and ordain to be mayor of the same borough, and that he so elected and ordained as aforesaid, might have and exercise the same office during the residue of the same year, his corporal oath being first taken before the town clerk and the chief burgesses of the borough aforesaid, or the greater part of them; and so, as often as the case should so happen (c); and if any burgess or inhabitant of the borough aforesaid, should be thereafter elected into the office of mayor, or into the number of the chief burgesses, or into the number of the free burgesses, or to any other office, place, or function, within the aforesaid borough, and such person so chosen, being apt and fit, should, after the same election should be

(a) Post, 370.

(b) Post, 370.

(c) Post, 370.

made known unto him, refuse, without reasonable cause to take upon him the said office, place, or function, to which he or they so refusing or denying, should be elected or nominated, that then it should be lawful for the mayor and chief burgesses aforesaid, being councillors, and the common council of the same borough for the time being (a), or the greater part of them, to set a reasonable fine upon him or them so as aforesaid refusing or denying, as to them should seem meet, and him or them so as aforesaid, refusing or denying to pay the fine so imposed upon them as aforesaid, to detain in prison until they should pay the mayor and burgesses the fine or fines so imposed to the use of the said mayor and burgesses for the time being (b). And if thereafter it should happen any of the aforesaid thirty-six chief burgesses, or any other officer or minister for the time being, or any burgess at any time thereafter in their offices, places, functions, and charges, ill to behave themselves, offend, or to commit any fault by which such delinquent or offender should be thought worthy by the judgment of the mayor, town clerk, and thirty-six chief burgesses aforesaid, or the greater part of them for the time being, to be removed from his office, function, or charge, within the aforesaid borough; then and so often it should and might be lawful to and for the aforesaid mayor, town clerk, and thirty-six chief burgesses, or the greater part of them, from time to time to remove such person or persons so ill behaving themselves, offending, or committing any such crime or crimes, from their offices, places, functions, and charges, within the borough aforesaid. And his said majesty for himself did, by the now reciting letters patent or charter, abolish, revoke, and annul, all other authorities, manners, and forms of choosing, nominating, and appointing the mayor of the borough aforesaid, or the officers, ministers, or burgesses, within the borough aforesaid, or any of them, willing and granting, and appointing that all and singular elections, &c., of the

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(a) Post, 378, 389.

(b) Post, 370, 382.

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borough aforesaid, or any of them thereafter to be made within the same borough, otherwise, or in any other manner and form other than according to the tenor, form, and effect of said letters patent, should be from thenceforth utterly void and of none effect. After enabling the mayor and burgesses to purchase and grant lands, &c., and to sue and be sued; the statement respecting the charter proceeds thus: and his said majesty for himself, &c., did grant to the said mayor and burgesses of his said borough of Devizes, and their successors for ever, that the mayor for the time being, and the town clerk, and chief burgesses for the time being, or the greater part of them; whereof his said majesty willed the mayor and the town clerk for the time being should be two, should and might have full power and authority of composing, constituting, ordaining, and making from time to time; such statutes and reasonable orders whatsoever, which according to their discretion should seem unto them to be good, honest, profitable, and necessary; for the good rule and government of the burgesses, artificers, and inhabitants (a) of the borough aforesaid, for the time being, and for the declaring in what manner and order the aforesaid mayor and burgesses, and the artificers, inhabitants, and dwellers of the same borough, should behave and use themselves in their offices, charges, and businesses within the same borough, and the limits thereof; for the time being, and otherwise for the further good and public utility and government of the same borough, and the victualling thereof, and also for the better preservation, governing, disposing, letting, and demising of the lands, tenements, possessions, reversions, and hereditaments; given, granted, and assigned, to the aforesaid mayor and burgesses and their successors, and whatever matters and causes of the borough aforesaid, or touching or concerning the state, right, and interest of the same borough, and that they and their successors, for the time being by the aforesaid mayor and

(a) *Post*, 358.

town clerk and chief burgesses, *being councillors*, and the common council of the same borough, and the greater part of them as aforesaid, as often as they should compose, make, ordain, or establish such laws, statutes, and ordinances, in form aforesaid, such and such like reasonable pains, penalties, and punishments, might impose and assess by imprisonment of their bodies, or by fines, or amerciaments, or by any of them, against and upon all offenders contrary to such laws, statutes, and ordinances, or any or either of them, as to the same mayor, town clerk, and chief burgesses for the time being or the greater part of them as aforesaid, should seem reasonable and meet, and should, and might have and levy the same fines and amerciaments, without the impediment of his said majesty, his heirs, and successors; all and singular which laws, statutes, and ordinances, so as aforesaid, to be made, his said majesty willed to be observed under the pain in the same contained; so nevertheless that such laws, statutes, ordinances, imprisonment, and amerciaments, were not repugnant or contrary to the laws, statutes, customs, and rights of his said majesty's kingdom of England; and his said majesty, for the better execution of his will and grant, willed and constituted that the aforesaid town clerk and chief burgesses, should, from time to time, be aiding and assisting to the mayor of the same borough for the time being, in all causes, matters, and businesses, to be executed touching, or in any wise concerning the same borough; and his said majesty for himself, his heirs and successors, further granted to the aforesaid mayor and burgesses of the borough of Devizes aforesaid, and their successors, that they and their successors from thenceforth and for ever thereafter, should and might have and hold within the borough aforesaid, in the Guildhall of the same borough, or in any other place convenient in the same borough; a court of record every Friday in every week in the year, and so from week to week, or from two, or three weeks, to two, or three weeks, as

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for a longer time at their pleasure, to be held and adjudged before the mayor, town clerk, *and chief burgesses being councillors*, of the borough aforesaid, for the time being, or to be held before twelve, eleven, ten, nine, eight, seven, six, five, or four of them, whereof the mayor of the same borough for the time being, and the town clerk of the same borough for the time being, his said majesty willed to be two. The charter, after defining the species of actions to be brought in the borough courts, directed that such complaints, pleas, suits, and actions, personal and mixed, should be determined before the said mayor, town clerk, *and chief burgesses being councillors* of the said borough for the time being, or before twelve, eleven, ten, nine, eight, seven, six, five, or four of them, whereof the mayor and town clerk of the said borough for the time being, to be two, in the Guildhall, at the same borough or, &c., by such and like precepts, &c. The charter then gave directions for the execution of meane and final process by the bailiffs and serjeants at mace, and for the adjournment of the Court by the mayor and town clerk, *and chief burgesses being councillors*, and for the overseeing and correction of victuals, and the examination, correction, and amendment of weights and measures by the mayor. And further his said majesty, for himself, &c., willed and granted that the mayor and town clerk of the said borough for the time being, and also one of the chief burgesses *and councillors* of the same borough from time to time (to be chosen by the mayor, town clerk, and common council of the said borough for the time being, or the greater part of them, whereof the mayor and town clerk, &c.), during the time wherein they should happen to be in their offices, should be his justices, and every of them should be justice of his said majesty, his heirs, &c., to keep the peace within the said borough and the liberties, limits, and precincts thereof. The authority of the justices is then described and restricted. The affidavit further stated, that 5th June, 15 Car. I., a charter was granted

to the mayor and burgesses of the said borough of Devon, confirming the former charter, and directing that from thenceforth there should not be any town-clerk, and that instead thereof, there should be one utter-barrister who should thereafter be named recorder of the said borough. And that the mayor and the recorder for the time being (and in the absence of the said recorder, his deputy), and the chief burgesses being the common council of the same borough for the time being, of which chief burgesses some were called, known, or distinguished by the name or distinction of chief burgesses' councillors of the borough aforesaid, or the greater part of them, at all times thereafter should have power and authority yearly and every year, on the Friday next after the Feast of Pentecost, to assemble in the Guildhall of the borough aforesaid, and then and there should and might choose, nominate, and assign one honest and discreet man of the aforesaid chief burgesses and councillors of the borough aforesaid, to be mayor of the said borough for one whole year next following the eve of the Feast of St. Michael, the archangel, after such election; and that he who so as aforesaid should be elected and nominated mayor of the borough aforesaid, before he should be admitted to execute the said office, that is to say, on the Feast of St. Michael, the archangel, yearly after his election, should take his corporal oath before his last predecessor, being last before mayor of the borough aforesaid, and the recorder of the borough aforesaid, for the time being (and in his absence, his deputy), and the residue of the aforesaid chief burgesses of the common council of the said borough for the time being, or the greater part of them, the mayor, or deputy recorder, and chief burgesses then there present, well and truly to execute the same office in all things concerning the same; and that the aforesaid last predecessor of the aforesaid mayor, so as aforesaid to be sworn, and the recorder, and in his absence, the deputy, and the aforesaid chief burgesses of the borough aforesaid,

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or the greater part of them there being present, should have power, by virtue of the now reciting letters patent, or charter, to give and administer an oath to the same mayor, so, as aforesaid, to be sworn for the true and faithful execution of the same office, without any other commission or warrant, by any means thereafter to be procured : and that, after such oath so given, the said mayor so as aforesaid sworn, should and might execute the office of mayor for one whole year then next ; and that the mayor and recorder for the time being, (and, in his absence, his deputy), and the aforesaid chief burgesses of the common council, for the time being, or the greater part of them, should have the nomination, election, and appointing of all, and all manner of such, and the like officers and ministers whatever, (other than the town clerk), to reside thereafter within the borough aforesaid, as at any time theretofore, within the same borough, had been elected to any office or place, or had had, held, enjoyed, or used any office or place, at such place or places within the borough aforesaid, and at such time or times as anciently theretofore had been used within the borough aforesaid ; and also all and singular free burgesses, of the borough aforesaid, thereafter to take into the number of free burgesses of the same borough ; and that such officers and ministers, and the aforesaid free burgesses to be taken into the number of free burgesses, severally, well and truly to execute their offices, should be sworn before the mayor and recorder of the same borough for the time being, (and, in his absence, before his deputy), and the chief burgesses for the time being, or the greater part of them, the mayor, recorder or his deputy, and chief burgesses then there present, before they should be admitted to such offices within the borough aforesaid, or to the places of free burgesses of the same borough ; and that the aforesaid mayor and recorder, (and, in his absence, his deputy), and chief burgesses of the borough aforesaid for the time being, or the greater part of them, the mayor, recorder (or his deputy), and chief burgesses,

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then present, should have full power, by virtue of the now reciting letters patent, or charter, to give and administer reasonable oaths, &c. (A corresponding power is then given to elect and swear in a new mayor in the event of death, or removal, or of refusal to accept the office). And if any chief burgess or burgesses, councillor or councillors, or chief burgess or burgesses of the common council, or any other free burgess or burgesses, or inhabitant or inhabitants of the borough aforesaid, should, thereafter, be duly elected into the office of mayor, *or into the number of chief burgesses councillors*, or into the number of *chief burgesses of the common council*, or into the number of free burgesses, or to any other office, place, or function within the aforesaid borough, and such person or persons so chosen, being fit, should refuse, without reasonable cause, to take upon him or them the said office, place, or function, to which he or they, so refusing, should be elected or nominated, that then it should be lawful for the mayor, recorder, and chief burgesses, for the time being, or the greater part of them, to put a reasonable fine upon him or them, so as aforesaid refusing, as to them should seem meet; and him or them refusing or denying to pay the fine, so as aforesaid imposed upon them, to detain in prison until he or they should pay the fine or fines, so imposed, to the mayor and burgesses of the borough aforesaid, to the use of the same mayor and burgesses, of the same borough, for the same time. (A power is next given to the mayor, recorder, and chief burgesses, to remove "*any chief burgesses councillors*, or chief burgesses of the common council, or any officer, &c. or any of the free burgesses of the same borough," for misbehaviour or crime. The charter then abolishes all other manners, forms, &c. of electing mayor, officers, ministers, and burgesses. It then proceeds to regulate the election to the newly created office of recorder). And, for the better execution of his said majesty, King *Charles's*, will and pleasure, his said majesty willed and granted that the recorder, for the time being, and, in his absence, his deputy, and the

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chief burgesses should, from time to time, assist and help the mayor of the same borough for the time being, in the execution of all causes, matters, and business, touching or concerning the same borough; and his said majesty, King *Charles*, for himself, &c., also willed and granted that the aforesaid mayor and burgesses, and their successors, from thenceforth for ever thereafter, should and might have, and hold, within the borough aforesaid, in the Guildhall, or in any other place convenient, in the same borough, one court of record every Friday in every week in the year, and so from week to week, or from two or three weeks, or for longer time, at their pleasure, to be held and adjourned before the mayor and recorder (and in the absence of the same recorder, his deputy), and *chief burgesses being councillors*, or before any four or more of them, the mayor, recorder (and, in the absence of the same recorder, his deputy), and *chief burgesses being councillors*, of which (*quorum* clause); with like powers, authorities, and jurisdictions, in all other respects, as in the said hereinbefore in part recited letters patent of his said late majesty King *James*, is in that behalf given and granted to the said mayor and burgesses. And his said majesty King *Charles*, further granted to the aforesaid mayor and burgesses, and their successors, that the then present mayor, and the aforesaid *Robert Nicholas*, constituted recorder of the same borough by the now reciting letters patent or charter, and also *Robert Dawe*, esquire, *one of the chief burgesses and councillors* of the borough aforesaid, and then one of the justices of the peace within the borough, and also the mayor and recorder and *one of the chief burgesses councillors* of the same borough, from time to time, and at all times thereafter, to be chosen by the mayor, recorder, and chief burgesses of the common council, or the greater part of them, whereof the mayor or recorder his majesty King *Charles* willed to be one, during the time wherein they should respectively happen to be in their offices or places, were, and should be, his majesty's justices, and every of them was, and should be, his ma-

jesty's justice, to preserve, maintain, and keep the peace within the borough aforesaid; the liberties, limits and precincts thereof. The jurisdiction of the justices is then defined. The relator's affidavit goes on to allege, that the two charters were accepted by the mayor and burgesses. The affidavit then states (upon information and belief), that on the 1st day of August, 1825, a certain council or meeting of the said mayor, recorder, and chief burgesses, was held at the Council-house or Guildhall of the said borough; and that at such council or meeting *Henry Headley*, Doctor of Medicine, *Charles Lucas*, clerk, *William Waylor*, *Thomas Scott*, *John Hayward*, *Charles Trender*, *James Bowman*, *William Sparks Tinney*, *Samuel Adlam Bayntun*, *Mark Brunton*, and *John Stratton*, were severally nominated, elected, and sworn chief burgesses of the said borough; and that at such council or meeting there were not more than the mayor, recorder, seven chief *burgesses* *councillors* or *aldermen*, and nine chief burgesses, at any time present at the said council or meeting, when the said *H. H.*, *C. L.*, *W. W.*, *T. S.*, *J. H.*, *C. T.*, *J. B.*, *W. S. T.*, *S. A. B.*, *M. B.*, and *J. S.*, were so severally nominated, elected, and sworn chief burgesses. And that on the 8th day of October, 1825, a certain council or meeting of the said mayor and chief burgesses was held at the Council-house or Guildhall of the said borough, at which council or meeting the said *H. H.*, *C. L.*, *W. W.*, *T. S.*, *J. H.*, *C. T.*, *J. B.*, *W. S. T.*, *S. A. B.*, *M. B.*, and *J. S.*, were again severally nominated, elected, and sworn chief burgesses of the said borough. And that at such last mentioned council or meeting, there were not more than the mayor, recorder, nine chief burgesses *councillors* or *aldermen*, and ten chief burgesses, at any time present at the said last mentioned council or meeting, when the said *H. H.*, *C. L.*, *W. W.*, *T. S.*, *J. H.*, *C. T.*, *J. B.*, *W. S. T.*, *S. A. B.*, *M. B.*, and *J. S.*, were again severally nominated, elected, and sworn chief burgesses; and that the said *H. H.*, *C. L.*, *W. W.*, *T. S.*, *J. H.*, *C. T.*, *J. B.*, *W. S. T.*, *S. A. B.*, *M. B.*, and *J. S.*, do, and each and every of them

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doth now hold and exercise the said office of chief burgess of the said borough; and that he hath also been informed and verily believes, that the said *H. H., C. L., W. W., T. S., J. H., C. T., J. B., W. S. T., S. A. B., M. B.,* and *J. S.*, ought not to hold and exercise the said office of chief burgesses of the borough, inasmuch as that the said *H. H., C. L., W. W., T. S., J. H., C. T., J. B., W. S. T., S. A. B., M. B.,* and *J. S.*, were not, nor was or were, any or either of them, duly nominated, elected or sworn chief burgesses of the said borough. And that the said *W. S. Tinney* and *S. A. Bayntun* have each for many months past ceased to reside in the said borough; and that he, this deponent, is unable after the most diligent search and inquiry, to ascertain where the said *W. S. Tinney* now lives, or is to be met with; and that said *S. A. Bayntun* is now with his regiment, which is stationed at Edinburgh or in some other part of Scotland.

This affidavit was sworn on the 19th of June, and on the 26th of the same month, the relator made a supplemental affidavit, stating that he was the relator at whose instance the application for the *quo warranto* was made, that he then was, and for fifteen years had been, an inhabitant, and had resided within the borough of Devizes; and as such inhabitant (*a*), was subject to the statutes and orders, to be from time to time made by the mayor and chief burgesses under and by virtue of the charters, in deponent's former affidavits mentioned; and was also within the jurisdiction of the court of record (*b*) of the said borough, in the said affidavit also mentioned.

In answer to this application, the affidavits of *W. W. Salmon*, and of the several defendants, were filed. That of *W. W. Salmon*, after stating that he had been employed in the business and concerns of the corporation of Devizes for the last twenty-four years, contained the following allegations. Deponent has never known or heard

(*a*) *Ante*, 350; *post*, 364. And see *Rex v. Hodge* (Penryn); 2 B. & A. 344. n.; *Rex v. St. John* (Wootton Bassett), Selw. N. P., 3th ed. 147.
 (*b*) *Ante*, 356.

of any person, in the said borough, or of and belonging to the said corporation, called or known by the name of *aldermen*, and that such of the chief burgesses of the said borough, as are distinguished by the name of chief or capital (*a*) burgesses councillors, have no separate functions distinct from those of the other chief or capital burgesses, other than such as are expressed and stated in the two several charters of *James I.* and *Charles I.* And that he was present on the 1st day of August, 1825, at a certain council or meeting of the said mayor, recorder, and chief burgesses, at the Council-house or Guildhall, of the said borough, when *Henry Headley*, doctor of medicine, *Charles Lucas*, clerk, *W. W.*, *T. S.*, *J. H.*, *C. T.*, *W. S. T. S.A.B.*, *M.B.*, *J. S.* and *J.B.*, were severally nominated, elected and sworn chief burgesses of the said borough. That after such election he was advised that the said parties were not legally elected by reason of there not being a majority of the thirty-six chief burgesses of the said borough, present at the said council or assembly. That he was present on the 8th of October, 1825, at another council or meeting of the said mayor, recorder, and chief burgesses, held at the Council-house or Guildhall of the said borough, at which council or meeting nineteen of the said thirty-six chief burgesses were present; and the said *Henry Headley*, *C. L.*, *W. W.*, *T. S.*, *J. H.*, *C. T.*, *W. S. T.*, *S. A. B.*, *M. B.*, *J. S.*, and *J. B.*, were again severally nominated and elected chief burgesses of the said borough; and the said *H. H.*, *C. L.*, *W. W.*, *T. S.*, *J. H.*, *C. T.*, *W. S. T.*, *M. B.*, *J. S.*, and *J. B.*, were at the same time again severally sworn to the execution of the said office of chief burgesses, as aforesaid; but the said *S. A. B.*, not being then present, was not sworn pursuant to such last mentioned election, until the 12th day of

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(*a*) In designating the members of the common council, the affidavits use indiscriminately the terms "chief burgesses" and "capital burgesses;" but as the latter

designation seems only to be a half-translation of the "*capitales burgenses*," of the charter, the former term has been substituted where the latter occurs in the affidavits.

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November, 1825; and that between the said 1st day of August, and the 8th day of October, 1825, there were three councils or meetings of the said mayor, recorder, and chief burgesses, at each of which deponent attended. And that the said *H. H.*, *C. L.*, *W. W.*, *T. S.*, *J. H.*, *W. S. T.*, *S. A. B.*, *M. B.*, *J. S.*, and *J. B.*, did not, at any or either of the said councils or meetings so held, between the said 1st day of August, and the said 8th day of October, 1825, or at any other time between those periods, in any way act or interfere in the affairs of the said corporation, but severally declined so to do. That the said *H. H.*, *C. L.*, *W. W.*, *T. S.*, *J. H.*, *C. T.*, *W. S. T.*, *M. B.*, *J. S.*, and *J. B.*, did not, nor did any or either of them in any way exercise the office of chief burgesses of the said borough, until after their said election and swearing, on the said 8th of October, 1825. That the said *S. A. B.* did not in any way exercise the office of chief burgess of the said borough, until after his said swearing on the said 12th day of November, in the same year. The affidavits of the defendants negatived their having exercised the office of capital burgess until they were respectively sworn in.

A second affidavit of *Wm. Wroughton Salmon*, sworn on the same day as the first, but in which he described himself as steward and clerk of the courts of the corporation, of the said borough, contained the following allegations: That on the 1st day of August, 1825, and from thenceforth unto and upon the 8th day of October, 1825, the corporation of the said borough consisted of twenty-five chief or capital burgesses, of whom twelve, including the mayor and recorder, were distinguished from the others by the name or title of chief or capital burgesses, counsellors. That on the 1st day of August, 1825, at a council or meeting of the mayor, recorder, and capital burgesses of the said borough, there were present eighteen chief burgesses, and that at such meeting eleven persons, viz, *H. H.*, doctor of medicine, *C. L.*, clerk, *W. W.*, *T. S.*,

J. H., C. T., W. S. S., S. A. B., M. B., J. S., and J. B., were, by the said eighteen chief burgesses then present, severally unanimously elected to be chief burgesses of the said borough. That it being considered that the said eleven chief burgesses were not legally elected, by reason of there not being a majority of the thirty-six chief burgesses of the said borough, present at their council or meeting, another council or meeting of the said mayor, recorder, and capital burgesses was held on the 8th day of October, 1825, and that at such council or meeting there were present nineteen chief burgesses; and that at such last mentioned council or meeting the said *H. H., C. L., W. W., T. S., J. B., C. T., W. S. L., S. A., M. B., J. S., and J. B.*, were again, by the said nineteen chief burgesses then present, severally unanimously elected chief burgesses of the said borough; and that at such last mentioned council or meeting, and of the chief burgesses who were present on the said 1st day of August, were absent, and did not attend, but that four other chief burgesses who were not present on the first day of August, attended and concurred in the election of the said eleven new chief burgesses; so that either on the said 1st day of August, or on the the said 8th day of October, all the former chief burgesses of the said borough attended, and concurred in the said elections, except three, namely;—*James Gent, Charles Tyler, and Edward Newman*; and, that the said *James Gent*, who was at that time confined by illness, has since the said 8th day of October, 1826, attended different meetings of the said mayor, recorder, and chief burgesses, and that the said *Charles Tyler*, was, on the said respective days, and still is resident in or near London, and the said *Edward Newman*, was, on the said respective days, and still is, resident at Walsall, in the county of Stafford, and neither of them, the said *Charles Tyler* and *Edward Newman* has attended any council or meeting of the said corporation since the said 8th day of October, 1825. That *William Salmon*, esq.

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one of the chief burgesses of the said borough, (not being of the number called *chief burgesses councillors*), died on the 12th day of October, 1826; that on his death the number of the chief burgesses of the said borough, exclusive of the said eleven newly elected burgesses, was reduced to twenty-four, of whom twelve are called *chief burgesses councillors*, and the remaining twelve (a) are not so called.

Scarlett, A. G., Taunton, Merewether, Serjeant, and Carter, now shewed cause. This court having a discretion in issuing writs of *quo warranto*, will not lend itself to any such views as these affidavits disclose, for the purpose of trying the question that is stated in the rule, as to what took place between the 1st of August and the 8th of October. The parties are charged with now exercising the office of chief burgesses; and that, it is true, they claim to exercise; but supposing it should appear to the Court, that on the election of the 1st day of August, of these different parties, some informality, or some defect took place, which, before the next term, namely, on the 8th of October, was rectified by holding a proper assembly to elect them. Supposing the Court to be of opinion the first election was vicious and the second good, it would not indulge the parties with the mere expense of having *quo warrantos* against six or seven persons to try a question which was conceded beforehand. No derivative title was created in the mean time. This application is founded upon a misapplication of a well known rule of law, to a cause which does not admit of its being so applied. On the first of August, eighteen chief burgesses only were present, whereas the whole body consisting of thirty-six, a majority of that number could not be less than nineteen. On that day nothing was done besides the swearing

(a) If the twenty-four chief burgesses who are not councillors are considered as a distinct integral part of the corporation, there

would, therefore, be too few left to constitute the necessary majority of that integral part; *Vide post*, 364.

in; it was then discovered that the election was void. When the parties stand on a right of election, and put that right in issue, the swearing in has been deemed sufficient evidence of acting under it as against them; but when they repudiate the right, upon discovering that they had no right, immediately after the swearing-in, and have done no other act, this Court has never granted a *quo warranto*. There is a case in which Lord Ellenborough held the swearing-in was a sufficient act; but that was a case where certain individuals of the corporation of Richmond in Yorkshire, having contended that they had an inchoate right to be admitted as freemen of the corporation, had claimed to be sworn in. They were sworn in for the purpose of trying the right; and being sworn in, when the *quo warranto* was moved against them, and the right was tried, it was found that they had no right; but then they contended among other things, they had not exercised the franchise, and stated, that the only act they did was the oath. Lord Ellenborough held, that that was a sufficient exercise, *when they claimed the right*; because the act of swearing in was evidence that they meant to stand on that right. That is a very different case from the present, where a *quo warranto* is applied for against parties who swear that the only act they did, was that of being sworn in: and having discovered that the election was void, they abstained from any other act whatever until they had a good election; and when the Court finds a good election has taken place, and that the party is now exercising the franchise under that good election, it will not grant a *quo warranto*, to try a matter of speculation which can answer no purpose, but that of creating expense, to gratify the spleen of some person, who chooses to make the motion. The affidavit states two charters, by which the borough of Devizes is now governed, and from these two charters alone are to be collected the rules by which the elections are to be governed; and as the object of this application is

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to put an end to the corporation altogether (a), the Court will bestow some anxiety upon it, before it will lend itself to such a purpose. The affidavit which is not made by a member of the corporation, but by an inhabitant (b) of the town and borough, begins to state, that the borough of Devizes, in the said county of Wilts, is a corporation by "prescription, with twelve *chief burgesses councillors*, "*or aldermen*;"—that word is stuffed in; a name never known in the corporation, "twelve *chief burgesses councillors*, or aldermen, and twenty-four chief burgesses." How does he prove that? he has not sworn, from one end of his affidavit to the other, of one single instance of usage. He does not know in what way this prescriptive corporation has exercised its franchise. He does not state in what way the election took place, but puts it entirely on the charters, which prove no ground whatever. The corporation consists of a mayor, a recorder, and the thirty-six chief burgesses. The mayor, therecorder, in his absence his deputy, and the thirty-six chief burgesses, form the common council. Because the charter states that some of the chief burgesses, are called *chief burgesses-councillors*, the relator chooses to put in "*or aldermen*," a term which does not exist in the charter at all, and to endeavour to constitute them an integral part of the common council; so as to make the majority of that body essential. The terms of the charter are so distinct from and so opposite to all the other charters on which the Court has put that construction, that it is not governed by those cases. The rule is, that, where the charter provides for a mayor, and for a definite body of aldermen, and then for a definite body of burgesses, and says, that the mayor and aldermen, and burgesses, shall form the common council, then, as all three ingredients are essential, there must be a majority of each definite body in order to form a good common council. This charter makes no distinction; but simply states that "of

(a) *Ante*, 362 (a).

(b) *Ante*, 358.

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the chief burgesses, some are called councillors," and those who are called councillors have no distinct functions in matters of elections, but are simply the class from which mayors are to be taken; and thus the charter puts the whole together, as chief burgesses, and gives the right of election to the whole or the major part. The charters of *James*, and *Charles*, refer to the existing usage. The only use which the defendants make of their affidavits, is to shew that no franchises whatever were exercised after the second of August; and that the object of this motion is to dissolve the corporation (a). The charter of *James* provides that the mayor and town clerk, with the thirty and six burgesses, being the common council, or the greater part of them, should have power yearly, and every year, on the Friday next after the Feast of Pentecost, of choosing, nominating, and assigning, and that they should and might choose, nominate, and assign, one honest and discreet man of the number of twelve chief burgesses called councillors, of the borough aforesaid, who should be mayor. That gives to the mayor and town clerk, with thirty-six burgesses, being the common council, power to elect one of the twelve burgesses, called councillors, to be mayor; to be sworn before his last predecessor, being next before mayor of the borough aforesaid, and the town clerk of the same borough, in the presence of the aforesaid thirty and six burgesses, and other burgesses, or the greater part of them. No functions belong to the chief burgesses councillors, except that the mayor is to be elected out of them. Then comes the provision under which this election takes place, and it is not altered by that of *Charles*: "And that the mayor and town clerk, and thirty-six chief burgesses, or the greater part of them, should have the nomination, election, and appointing of all, and all manner of such, and the like officers and ministers whatsoever, thereafter to reside within the same borough." It does not state that the

(a). *Ante*, 362 (a), 3 P.

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mayor and chief burgesses councillors, *and the other* chief burgesses are to elect; but the mayor and the *thirty-six* chief burgesses of the borough, or the greater part of them, are to elect all other officers whatsoever. Under the charter of *James*, the majority of the thirty-six, with the mayor or the town clerk presiding, elected all the capital burgesses and other officers. The charter of the fifteenth of *Charles I.* recites the charter of *James*. It enacts that, instead of the town clerk, there shall be a recorder, and then provides that the mayor of the said borough, for the time being, and in the absence of the recorder, his deputy, and the chief burgesses, being the common council, of which said burgesses some are called, known, or distinguished by the name or distinction of chief burgesses councillors of the borough aforesaid, or the greater part of them, " should have power to elect one honest and discreet man of the aforesaid chief burgesses and councillors of the borough aforesaid, to be mayor thereof, who is to be sworn in before his predecessor and the recorder, or his deputy, and the residue of the aforesaid chief burgesses. When the chief burgesses, who are stated to be thirty-six in number, are the body to elect the mayor out of the class of the chief burgesses, called the chief burgesses councillors; and when the electing clause does not state that the mayor and the chief burgesses councillors, and the other persons are to elect, but speaks of the whole thirty-six as one body, the principle derivable from the cases which have been referred to, has no application. The relator does not choose to inform the court what the usage has been: he simply gives the charters, and on those he makes his stand. It is not stated that, by usage, the chief burgesses councillors, formed a definite body. The chief burgesses themselves, with the mayor, are to elect each other, and to elect the chief burgesses councillors, out of whom the mayor is to be chosen, and before four of whom the courts are to be held. They are, therefore, a species of magistrates in the borough. There is nothing in the charter to give them a separate function; and the

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thirty-six are mentioned as one aggregate body, without the usual clause, which has been the constant foundation on which the court has acted upon that construction, namely: "mayor, aldermen, and burgesses forming the common council." Whenever the charter specifies the integral parts, who are to be present to form the common council, the court has said that there must be a majority of each integral part (a). Here the whole body, mixed together, are the thirty-six chief burgesses, and the clause, in the charter of *Charles*, which makes the distinction, puts in a parenthesis, "of which some are called coun-
 cillors." It would be oppressive to subject nine or ten gentlemen to the expense of a *quo warranto* to decide a question of construction which is to be settled on the grammar in five minutes. On the 8th of October, there was a majority of the thirty-six, but not a majority of the twenty-four. In every one of the cases in which the court has acted upon this objection, there is in that clause of the charter which prescribes the mode of election, a distinct recapitulation of the different component parts of which the common council or elective meeting is constituted, rendering every one of those component parts necessary to be present; and in every one of those cases a minority only of some necessary integral component part was present. In *Rex v. Miller*, (b) the election of the mayor was to be by the mayor and his brethren, (who, *Lord Kenyon* said, meant the bailiffs), such persons as had been mayor and bailiffs, and the forty-eight select burgesses. Forty-eight select burgesses then were a distinct integral part; but of those forty-eight, three only were present. In *Rex v. R. Bower*, (c) the charter directed that there should be a mayor, aldermen, bailiffs, and twenty-four chief or principal burgesses; the mayor and aldermen or the greater part of them were to choose four of the burgesses, and out of those four, the mayor, aldermen, bailiffs,

(a) *Post*, 377, 8.

(c) (*Weymouth*) 2 D. & R. 761;

(b) (*Northampton*) 6 T. R. 268; 1 B. & C. 492; *post*, 373, 8, 383.
post, 373, 382, 3.

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principal burgesses, and other burgesses, or the greater part of them were to choose one to be mayor; so that here there was a distinct enumeration of all the different component parts of the common council, and all those component parts were directed to be congregated together, and the major part of them so congregated, were to choose the mayor. There can be no doubt, therefore, that each of those component parts formed a distinct integral part of the common body, and that they must be all represented at every election by a majority of each class, *Rex v. Devonshire*, (a) was the same nearly as *Rex v. R. Bower*. The question there proceeded, rather on words which were supposed to distinguish that case from others. From the beginning to the end of these charters, the thirty-six chief burgesses are spoken of as constituting one solid mass, as it were. The twelve councillors have no functions separate and distinct from the other twenty-four. The word "aldermen" does not occur in either of the charters; nor is there any affidavit that those whom the relator has thought proper to call aldermen, were ever termed aldermen, or called by that name, or reputed to be such, or that they exercised any one function commonly appertaining to the office of alderman. This appellation, therefore, was introduced for the purpose of giving colour to the case, and of endeavouring to supply the defect of evidence, by giving a name, and thereby making apparently the twelve, under the name of "aldermen," form a separate and distinct class from the twenty-four. The Court is to be holden by the mayor, the recorder, and the twelve or any four of them; that is nothing more than saying, that there shall be a Court of Record within the borough, and that certain persons shall be the judges; but that is no corporate function. Suppose the king had thought proper to say that the mace-bearer should be judge of the Court, that would have made him a judge, but would not have given him any corporate capacity: so here, when the mayor and recorder, and the

(a) (Truro) 3 D. & R. 83; 1 B. & C. 609; *post*, 386. And see *Rex v. Wylliams*, (Truro), 3 D. & R. 75.

four councillors hold their Court of Record, they are holding a Court under the provisions of the charter, but they are not exercising any corporate function, or acting in any corporate capacity. There is one other distinction, and one only, appertaining to the twelve councillors, and that is this, that the mayor, the recorder, and one of these councillors, to be elected by the common council, are to act as justices of the peace. But the office of a justice of the peace, is quite distinct from a corporation. In a case which was before this Court a very short time ago the question was, whether a deputy alderman of the borough of Denbigh was entitled to act as a justice of the peace, the aldermen themselves being justices of the peace under that charter. The Court said, that the office of justice of the peace was different from that of alderman: and that although the aldermen themselves were, under the charter, justices of the peace, it by no means followed that the aldermen could make the deputy a justice, much less that the deputies, merely by virtue of being deputies, became justices of the peace; because, said the Court on that occasion, a justice of the peace is a perfectly different person from a mayor or an alderman. In saying that, the Court followed what was laid down by *Lord Holt*, in *Regina v. Langley* (a). *Lord Holt* there said, that it did not follow because a man was a mayor of a borough or a city, that therefore he was a justice of the peace; he may be a mayor, and yet not a justice; in order to be a justice of the peace of a borough or city, it is necessary there should be an express grant in the charter, making the mayor or alderman, a justice. When this charter constituted the mayor, the recorder, and one of the twelve councillors justices, that was not by any means adding to the corporate capacity, or the corporate functions of the twelve. Now, with the exception of the mayor being taken from the twelve, of the Court of Record being held before the mayor, the recorder, and four of the twelve, and of the

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(a) 2 Lord Raym. 1029, 1030.

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mayer, the recorder, and one of the twelve being justices of the peace, there is not the semblance of distinction between the twelve and the other twenty-four; and in one of these circumstances of difference, is there any thing of an executive nature, in the functions of these twelve councillors, which distinguishes them from the other twenty-four chief burgesses. In every matter touching the government regulation of the borough which is conferred on the thirty-six, they are spoken of as constituting one common body, without distinction. Throughout the charters, in every thing that prescribes what shall be done by the common council, they are invariably called *thirty-six* capital burgesses, without any distinction. In the election of the mayor, it is ordered (*a*), that the mayor and town-clerk, together with thirty-six chief burgesses, being the common council, without any distinction, shall elect the mayor; so, when the mayor is to be sworn in (*b*), it is before the mayor, town clerk, and the thirty-six chief burgesses; so officers and free burgesses are to be elected by the mayor, town-clerk, and thirty-six chief burgesses (*c*); they are to be admitted, also and sworn, before the mayor, town clerk, and chief burgesses (*d*). So, in the case of death or removal of the mayor (*e*), the vacancy is to be supplied by the town clerk, and thirty-six chief burgesses; so, with respect to the power of making bye-laws, they are to be made by the mayor, town-clerk, and chief burgesses (*f*). [*Bayley, J.* There is another clause, which, perhaps, may establish a distinction between those instances in which the twelve and the twenty-four are to join, and those in which they are not; that is, where a fine is to be imposed if the party elected "refuse to take on himself the said office, function, or ministry." (*g*)] In that case, the power is given to the mayor, and chief burgesses aforesaid, being councillors, and to the common council. The power of making

(*a*) *Ante*, 347, 353.

(*d*) *Ante*, 348.

(*f*) *Ante*, 350.

(*b*) *Ante*, 347.

(*e*) *Ante*, 350.

(*g*) *Ante*, 348.

(*c*) *Ante*, 347, 350.

bye-laws is also vested in the mayor, town clerk, and chief burgesses, generally (a); when the charter comes to speak of the power of fixing the penalties, there it speaks of the penalties to be fixed by the mayor, the town clerk, and chief burgesses, being councillors, and the common council of the borough (b); so that it should seem, that if there is in any degree a difference under either of the charters, between the capacities of the twelve and the twenty-four, that is anxiously and particularly pointed out in the charter itself; but in all the other instances, and particularly in the election of mayor, in the election of all the officers of the corporation, in the election of free burgesses, the thirty-six are spoken of as constituting one common, indiscriminate, mass of electors. Thus it is in the charter of *James*; and it is equally so in the following charter of *Charles* the first. In that, the chief burgesses are spoken of, generally, as being those who are to elect a mayor (c). And the same power is given to them to elect chief burgesses, the other officers, and free burgesses of the corporation; so that, in all instances of *election*, the franchise is to be exercised, not by the twelve and twenty-four, as constituting distinct aliquot parts of one body, but by thirty-six persons, indiscriminately named, and indiscriminately exercising the functions of common councillors.

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Campbell, Erskine, and Parke, contra.—It is allowed that the election on the 1st of August, 1825, was bad; but it is said that the defendants have not acted; from the moment, however, when they were sworn in chief burgesses, they became so *de facto*; and if they had remained unquestioned chief burgesses for six years, from the 1st of August, 1825, and had never done any one act in the meantime, their title would have been protected by the statute. (d) [*Bayley, J.* If they disclaim,

(a) *Ante*, 350.

(b) *Ante*, 351.

(c) *Ante*, 347.

(d) 32 *Geo.* 3, cap. 58; and see *Selw. N. P.*, 8th ed. 1150.

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that answers all the purpose]. If the Court should be clearly against the application on the other grounds, it would not be advisable to carry such a *quo warranto* down to trial. A disclaimer would be sufficient; and if there were derivative titles between the 6th of August and the 8th of October, that would clear the ground and would prevent any embarrassment afterwards. There are in this corporation two distinct definite bodies, the twelve, and the twenty-four; what the twelve are called is very immaterial. The functions of these twelve are the functions of aldermen; and no distinction can be pointed out between these twelve aldermen, and the twelve aldermen generally to be found in other corporations. They are the persons from whom the mayor is to be elected, from whom the justices are to be elected, who actually form the court of record for the trial of debts within the borough, and form the court of quarter sessions. It is said that no corporate functions are ascribed to the twelve. What corporate functions are ascribed to twelve aldermen in general? All that is to be looked to is, that there is a distinct body of aldermen, and of burgesses. It is admitted that there is that distinct body, and that there must be twelve of the one and twenty-four of the other. The clause in the first charter with respect to the election of a mayor (a), shews that at that time there were thirty-six, twelve, called chief burgesses councillors, and the twenty-four, only chief burgesses. It is said that the number, twenty-four, is not mentioned; but if twelve be taken from thirty-six, twenty-four will remain; and, therefore, the charter shews there were twenty-four, just as distinctly as if it had gone through the operation of subtraction, and the residue of twenty-four had actually remained. Thus it appears that there have been two distinct bodies in the borough, the twelve, and the twenty-four, recognized throughout as distinct definite bodies; and the corpora-

(a) *Ante*, 347.

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tion could not exist without the twelve, and without the twenty-four." It is submitted that there is no distinction between the elective body for the election of a mayor, and that for the election of capital burgesses. The provision regulating the election of a mayor (*a*), is exactly the same as if the power of election had been given by name to the twelve chief burgesses councillors, the twenty-four chief burgesses, the mayor, and recorder, or the greater part of them. If that had been the case there can be no doubt that, according to *Rex v. R. Bower* (*b*), and several decided cases, there must have been a majority of the twelve, and a majority of the twenty-four, to make a good elective assembly. It can make no difference that the king says that there shall be a common council consisting of twelve and twenty-four, and that such common council or the greater part shall elect a particular officer, or that *the twelve and twenty-four*, or the greater part of them shall elect. [*Bayley, J.* In the one case you name them as individual bodies, in the other you name them in the aggregate. Where the king says the common council shall consist of twelve and twenty-four, there can be no good common council unless there be a majority of the twelve and twenty-four]. [*Holroyd, J.* That is not so said, I believe, in this charter]. It is admitted that where a right of election is given to twelve and twenty-four, or the greater part of them, there must be seven of one and thirteen of the other. Then suppose it is said that twelve and twenty-four shall form the common council, and that the right of election shall be in the common council or the greater part of them; there is no distinction in reason between the two cases; and to have a good common council you must have seven of the one and thirteen of the other. For what purpose does the king introduce the parenthesis in the charter, but to make the distinction between the chief burgesses councillors, and

(a) *Ante*, 347. (b) 2 D. & R. 761; 1 B. & C. 452; *Ante*, 367.

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the chief burgesses, between the twelve, and the twenty-four. He says, of which said chief burgesses some are called, known, or distinguished by the name or distinction of chief burgesses councillors of the borough aforesaid, or the greater part of them; thereby intimating that there must be the twelve, *and* twenty-four. The election is to be in the thirty-six; but the constitution of the thirty-six is twelve and the twenty-four. Suppose the king had said it should be in the twelve and twenty-four or the greater part of them. In that case there must have been a majority of the several component parts. It can make no difference that it says it shall be of thirty-six, composed of twelve and twenty-four. The intention of the charter is, that the mayor and chief burgesses should all be elected in the same manner. [*Holroyd, J.* If it had said the twelve and twenty-four, or the greater part of them, then the construction would be that there must be the greater part of the twelve, and the greater part of the twenty four, but it says the the thirty-six or the greater part of them. Is not that the greater part of the thirty-six?] But then the king goes on to say that the thirty-six are constituted of the twelve and twenty-four, which is the same as if he had said twelve and twenty-four making thirty-six, or the major part of them. Where the king says of whom some are called chief burgesses councillors, he alludes to them to shew that they are to form a constituent part of the assembly; that is the very object of it. Then could a mayor be chosen if the twelve were entirely gone? [*Holroyd, J.* The twelve are only mentioned there as the persons out of whom the choice is to be made, not as the persons who are to make the choice]. The number twelve is only mentioned as the body from whom the mayor is to be taken. When the constituent body is mentioned, it is said of which chief burgesses some are called, *or* known, or distinguished by the name or distinction of chief burgesses councillors. That necessarily

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refers to the twelve; and, therefore, by the nomination of these twelve, the king makes the twelve or the major part of them a necessary part of the elective assembly; and there could not be a good election of mayor unless there were a majority of the twelve present. If there must be any, it is quite clear there must be seven. When the king says so anxiously "of which chief burgesses some are called or known, or distinguished by the name or distinction of chief burgesses councillors," he gave no power to the twenty-four, in the entire absence of the twelve; the words directing the election of chief burgesses (a) constituted the thirty-six the elective bodies with respect to such election, as the thirty-six are constituted, namely, of two integral distinct bodies. Then supposing the common council had been constituted of the thirty-six, consisting of twelve and twenty-four, or two distinct bodies, and it had been said that the common council, or the major part of them, should elect, it seems to be conceded that a majority of both, of the twelve and twenty-four, would have been necessary. Now the words are "of the thirty-six." Then the thirty-six are constituted by the twelve and twenty-four, two separate distinct independent bodies; which is the same, in substance, as if the king had said, that the twelve and twenty-four, or the greater part of them should meet and elect; and it never could have been intended that an election should take place without the presence of a single chief burgess councillor. All the mischief pointed out in *Res v. Miller* (a) seems to apply to this case. [Bayley, J. There the right of election was specifically in particular persons.] This is the first case which has arisen as to the right of election given to an aggregate body, consisting of separate and independent parts; and that a solemn construction may be put on such a charter, it is submitted that this rule should be made absolute: Lord Kenyon says, and this proposition

(a) 6 T. R. 268; ante, 367; post 378.

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seems to be now clearly established, that "where there is a definite body in a corporation, a majority of that definite body must not only exist at the time when the act is to be done by them, but a majority of that body must attend the assembly when such act is done." Mr. Justice *Ashurst* says, "where a body corporate consists of several integral parts, if one part is annihilated the whole body is dissolved." Can it be said here, that if the twelve were annihilated, there could be a good election of a mayor? If it must subsist, then it must be present; and if the court should hold that there was no necessity for any one of the twelve being present, it would hold that the twelve might be annihilated, and yet the corporation of *Devizes* would subsist, although the body from whom the mayor is to be elected be annihilated, although the body be annihilated from whom the justices are to be elected, although the body be annihilated who are to hold the courts of record, and quarter sessions, for the trial of all criminal offences. "The legislature in forming this corporation was not acting without reason and sound policy in appointing these different checks and controuls over each other. The corporation was to consist of several bodies, one of them consisting of forty-eight persons, and if a major part of those forty-eight be gone, the corporation is dissolved, because it is no longer capable of performing its functions agreeably to the intentions of the founders there, that body is reduced to nineteen; and there cannot be a legal corporate meeting, for the purpose of choosing a mayor without the integral part of the corporation." Mr. Justice *Lawrence* says, "the election in this case is to be made by a majority of the mass composed of several different classes, I do not say that when so met there must be a majority of each of the classes." The defendants were at great pains to shew that the thirty-six were considered as a mass. They are, but then a mass composed of distinct parts of the whole, who when so

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properly assembled, may elect. "In short a majority of each integral part of the corporation must meet, in order to make a good elective assembly, though an election by a majority of those assembled is valid." Herethen there has not been a majority of each integral part of the corporation, because the twelve, are an integral part of the corporation, and the twenty-four are an integral part of the corporation, and of the twenty-four ten only assembled. The usage, it is true, is not set out in the affidavits. The application does not rest on the usage. If there had been a usage it lay on the other side to shew it. According to *Rex v. Hoyte (a)*, there may be a usage in the corporation, whereby a less number than the majority of each integral part might make a good constituent assembly; but it lay on the defendants to shew the usage. They being silent on that subject, it must be taken that there is no usage contrary to the charters; and the court will decide on the charters. It is said that this is a question merely of election, and that it has nothing to do with the functions which are given throughout this charter, to the twelve chief burgesses councillors in respect of Courts of Record, in respect of their being Justices, or in any other respect. In matters of election, however, they appear to have a co-ordinate jurisdiction with the chief burgesses. In this respect there is no difference between these chief burgesses councillors, and aldermen in all other corporations; because, although the court requires that in the election of any particular individual, when the body is assembled, it must be composed of a majority of each definite part, yet when it is assembled, the majority of the assembly, not the majority of the constituent part, is required; and therefore, although they have a co-ordinate jurisdiction here, they are still in the same situation as all other corporations. It is necessary that a majority of each of the parts of this common council should

(a) 6 T. R. 430 (Grampound); *post*, 384.

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act, because the principle is, that when any thing is to be done by the general assent of a corporate body, of the common council for instance, a majority of each definite part of it must be present. Lord *Tenterden* said (a) "much good is derived from adhering to general rules, and this rule, as to corporations, is in itself extremely beneficial, as it compels them to fill up, from time to time, the vacancies that occur." Now not only is the mayor to be elected from this definite body (b), but this definite body constitutes the Court of Record (c); from this definite body are elected the justices (d); and this definite body is also to inquire into the imposition of fines (e). It is of great importance therefore that those rules on which corporations have hitherto been regulated, and which compel them to keep up the full definite body, should be abided by. Now here, if the majority of the twelve are not necessary to be present, it would scarcely ever be necessary to keep up the full body of twelve; but on the principle which regulated the decision in *Rex v. R. Bower* (f), it would be necessary to have these twelve chief burgesses councillors kept up. [*Littledale, J.* There is one part of the charter which seems to be very singularly expressed. In the early part of the charter of James I., it is said "that the mayor, and common clerk, called the town-clerk of the said borough, together with thirty and six chief burgesses of the said borough, being the common council of the said borough." (g) There it says, the thirty-six are to be the common council, and perhaps the town-clerk also; then, in a subsequent part (h), "if any person refuses to execute any office or function to which he is elected, then it shall be lawful for the mayor and chief burgesses aforesaid, being councillors, and the common

(a) 1 B. & C. 498, in *Rex v. R. Bower*.

(b) *Ante*, 347, 353.

(c) *Ante*, 351.

(d) *Ante*, 352.

(e) *Ante*, 351, 371.

(f) 2 D. & R. 761; 1 B. & C. 492 (Weymouth); *ante*, 367, 375.

(g) *Ante*, 347.

(h) *Ante*, 349.

council of the said borough." Now from that language it would appear that either the common council is confined to the twelve, or else confined to the twenty-four, or else it is an inaccurate expression; because it is "being councillors and the common council." The charter makes the point quite plain; where the charter of Charles I. speaks of the election of mayor, it says that the mayor shall "be elected by the thirty-six chief burgesses, some of whom are called chief burgesses councillors." [*Littledale, J.* There is clearly an inaccuracy of expression; the language here is "shall be lawful for the mayor and chief burgesses aforesaid, being councillors, and the common council of the borough" (a). The words, "and the common council of the borough," must either be a further description of chief burgesses, or else they must be a distinct set of people; whereas, before, it was said the thirty-six should be the common council]. That clause has been made use of against the application, as containing a distinction which is omitted in the clause respecting elections. From that part of the charter it seems to be clear that the term chief burgesses councillors, and the common council, and the term chief burgesses generally, are made use of indiscriminately. So far from that affording an argument for the defendants, it shews that the king, when he speaks of thirty-six chief burgesses, is speaking of those thirty-six chief burgesses as compounded of two different bodies. In the clauses giving power to impose fines (b) and demise lands (c), the language which designates the different parts of the common council, is used in the same sense as the general term of "chief burgesses," because it is not the major part of them, only, but the major part of them "as aforesaid;" and the last "aforesaid," the last antecedent is the power to the mayor and chief burgesses. Throughout this charter therefore the terms "chief burgesses," and "common council," are used as designating the two different bodies, chief bur-

(a) *Ante*, 349.(b) *Ante*, 348, 9.(c) *Ante*, 350.

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gesses councillors, and chief burgesses not councillors. Such two different bodies, having two different functions to perform, they are integral parts of the corporation, and a majority of each of these parts must be present at the time of election. This number of twelve chief burgesses councillors, is not a mere titular distinction given to twelve chief burgesses. It is clear from the charter that the chief burgesses councillors form a separate body, elected from the rest of the corporation. It is therefore of great importance that the corporation should be compelled to keep that body full; because it is from them that the justices are to be supplied; and it is one of the great advantages to be gained by compelling a majority of each definite body to be present at an election that they are compelled thereby to fill up. If it should be decided that it is not necessary that a majority of these persons should be present, it will be open to this corporation, as it has been practised by many other corporations, to keep just so many of the definite body elected, as will be necessary to answer any party purpose in that corporation. Whereas if it be laid down as a general rule that the body is a definite body, so to be kept up, and that it is desirable that the majority should be present for the purpose of keeping it, and as *Lord Tenterden* said in *Rex v. R. Bower* (a), that the court would not yield to nice and subtle constructions, in order to defeat such a purpose. [*Bayley, J.* In *Rex v. Devonshire* (b), the chief burgesses were to be elected by the remaining chief burgesses; and of those chief burgesses four were aldermen. I do not think the court held that it was necessary that there should be three aldermen present.] It became unnecessary in that case, because there was not present a majority of the whole aggregate body. Now if upon the face of the charter, and of the affidavits, it is in any degree doubtful what is the right, then for the


(a) 2 D. & R. 761; 1 B. & C. 492; ante, 377, 8.

(b) 3 D. & R. 82; 1 B. & C. 602; ante, 368.

purpose of having that ascertained, the court will make this rule absolute. It has been said that the relator has not sworn to any usage by which it can be shewn that hitherto such a number of the burgesses councillors have been present. The relator is not a member of the corporation; it is not in his power then so accurately to know what the usage in this corporation has been; but inasmuch as he has put this forward as the ground of this complaint, and has charged this as being an improper mode of electing chief burgesses, if it had been the usage to elect without such a number, those who answer this affidavit, and who are members of the corporation, who have the opportunity therefore by reference to their books, and by reference to their officers, to know what has been the constant usage, would have put it on the face of their affidavits. From the fact that there is no denial of its having been so on a former occasion, it may be inferred that at any rate it is by no means clear. On a former occasion it appeared that the majority have not always been present; and an opportunity would be afforded, by making this rule absolute, of having that fact clearly ascertained, in order, if usage is to give an interpretation to this charter, (and it could not give an interpretation contrary to the meaning), that it might explain it and shew what was the meaning from all time. That would be found by sending it down to be tried. In *Rex v. Warlow* (a), a rule *nisi* was granted against persons, who before cause shewn, resigned. [*Bayley, J.* There were many derivative titles there.] That does not appear by the report; the defendants had resigned, and the resignation had been accepted: and there was nothing to try, but whether they were duly elected, having acted in the mean time. Though they had virtually disclaimed, still the court made the rule absolute. It does not appear on any of the affidavits, that no derivative title was created under the void election of the 1st of August. It is said that they have not acted. [*Bayley, J.* It is stated that they did

(a) 2 M. & S. 75 (Pembroke).

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no other act than that of being sworn.] It is so stated ; and it is hoped, that on this principal point, the court will think it right to make this rule absolute, in order that it may be determined for the first time. Upon the other point, this rule should be made absolute in order that it may be determined for the first time, whether, when a charter gives the elective power to a body by its general name, which body appears from other parts of the charter to consist of two distinct classes, a majority of each of those classes is required to be present ; or whether a majority of the body, no matter how composed, is sufficient. That case has never yet been determined. In the other cases the charters designate that particular part of which the general body is composed ; in this the thirty-six chief burgesses are spoken of generally as being the common council ; but from the other part of the charter, it is clear that those thirty-six are to be formed of two distinct bodies, one of which has separate functions to perform, of great importance. The court has to decide whether, when a charter uses the general term " common council," or fixes the number of burgesses of which the common council is composed, a majority of each integral part of that common council, or a majority of the general body, is required. On the principle laid down in *Rex v. R. Bower* it is highly beneficial that it should be required, that a majority of each part should be present at the election. This charter is to be construed with reference to the ancient state of the borough ; and on this affidavit, and this statement of the charter, there is quite enough to shew that this was a borough by prescription, with twelve chief burgesses councillors, or aldermen, and twenty-four chief burgesses. Looking at the first charter, it appears that there was a definite body in the town, called councillors-burgesses. In the charter they are called chief burgesses councillors, and it proceeds to give directions respecting the nomination of officers ; in which the body of burgesses councillors, is directed to be, as it anciently has been, in the borough. In the part of the

charter which has relation to the twelve chief burgesses councillors (*a*), the term "officers" must clearly relate to the burgesses councillors; and that is shewn most distinctly afterwards, when speaking of a fine for not serving (*b*). Then inasmuch as there is no intimation of any other existing charter, it will be taken, that it is a corporation by prescription, with that prescriptive body. Construing the charter, with reference to that prescription, the court will say whether it is not essential that there should exist a majority of the twelve, and that a majority of the twelve should be present at the meeting at which any officers are chosen.

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BAYLEY, J. (*c*) If these affidavits carried a reasonable doubt in our minds, we should make the present rule absolute; but if on carefully considering them, no reasonable doubt be produced, we ought not to grant a rule which will of necessity, have the effect of producing very considerable expense. In this case the affidavits are perfectly silent on the subject of usage, and Mr. *Campbell* rightly enough puts this case simply on the construction of the charter. The general rule I take to be this, that when you give a right of election to persons, describing them by their corporate character, every member which enters into that description must concur, and must be present at the time of the election; and in the case of definite bodies you must have a majority of every definite body; as for instance, if you give a right of election to the mayor, aldermen, chief burgesses, and other burgesses, the aldermen and the chief burgesses, being each of them definite bodies, then it is essential that you should have a majority of the aldermen present, and a majority of the chief burgesses; but the necessity of the concurrence of each integral part, may or may not, be applicable, according to the language of the right of election, when you

(*a*) *Ante*, 377, 2.

(*b*) *Ante*, 349.

(*c*) *Lord Tenterden*, C. J., had left the court.

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can see the terms in which the right of election is granted. In *Rex v. Hoyte* (a), it was held that a charter might be so worded as not to require a concurrence of a majority of the definite bodies: in the case of *Rex v. Miller* (b), *Rex v. Bellringer* (c), and *Rex v. R. Bower* (d), you had words giving the right of election to specific bodies, as mayor, aldermen, and so on. In this case there is no account of what was the usage prior to the period of time when the charter was given; and although it is a corporation by prescription, and although it would appear from the language of the charter of *James I.*, that it was not then for the first time that there had been thirty-six persons chief burgesses, twelve of whom were councillors also, for what period of time they had existed, and what were their respective rights, is not upon this charter in any degree set forth. Assuming, as it is assumed on the part of the relator, that at that period of time there must have been in existence twelve and twenty-four, the language of this charter is material to be looked at, because from the language of the charter, it will be seen whether it was intended there should concur the presence of a majority of the twelve, and the presence of a majority of the twenty-four. If that were the case, the language natural to be used, would have been, that the party should be elected by the mayor, town-clerk, and the twelve councillors, and the twenty-four chief burgesses;—that would have been the obvious language which one should have expected would have been used; and on looking at the charter one finds, that upon particular occasions, that is the language that is used; perhaps, because the king in giving the charter, meant in particular instances, when fines were to be imposed, there should be a difference between these cases and those cases in which they were to meet merely for the purposes of ordinary election. Now the charter says, the right of electing the mayor shall be in

(a) *Ante*, 377.

(b) *Ante*, 367.

(c) 4 T. R. 810 (Bodmin).

(d) *Ante*, 367, 375, 383.

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the mayor, the common clerk or town-clerk of the borough, together with thirty-six burgesses of the borough, being the common council of the same borough, for the time being; who, or the greater part of them, from time to time, and at all times hereafter, shall have power of electing the mayor. Then the right is to the thirty-six by number; as if that was a body known or considered as consisting of a number of thirty-six, and making no distinction, as, I believe, was done in every case in which the necessity of the concurrence of the presence of every integral part has been required, in all those cases specifying the different parts in the corporation. It then comes to the power of nominating and electing to other offices; and then it says, that the mayor and town-clerk of the borough aforesaid, and thirty-six chief burgesses of the same borough for the time being, or the greater part of them from thenceforth for ever, shall have the nomination, election, and appointment. Then the right is given, not to the twelve and to the twenty-four, not to the common council assembled, but it is to the mayor and to the thirty-six; using no language to make a distinction between any of the individuals of whom that thirty-six were composed. There are afterwards, in two parts of the charter, fines imposed; and the variation of the language which is used on that occasion is, as it seems to me, strongly in aid of the construction which I think ought to be put on this charter, that in case of a refusal to take on themselves corporate offices, or in case of enforcing bye-laws by particular fines, then the right is given to the mayor and chief burgesses being councillors, and the common council of the same borough for the time being, or the greater part of them. Therefore in that case pointing out when you are to go the length of imposing a fine, and in that case only you shall consider the twelve as constituting a distinct body from the rest, and it shall be essential there be present a majority of that definite body as well as of the other parts of the corporation. When you come to the

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charter of *Charles I.* the language of it seems to bear and require a similar construction. It states that there are at that time clearly in the corporation a body of thirty-six, consisting of twelve who are councillors, and twenty-four who are not. That being the case, if, at the election of officers, they were to have the concurrence of the definite body of twelve, and a concurrence of the definite body of twenty-four, it would have been obvious to have used the language, that the right of election should be in the mayor, and in the councillors, and in the residue of the chief burgesses of the said borough; instead of which the language is, that the mayor for the time being, and the recorder of the same borough for the time being, and in the absence of the said recorder, his deputy, and the chief burgesses being the common council of the same borough for the time being, of which chief burgesses some were called, known or distinguished by the name or distinction of chief-burgesses-councillors of the borough aforesaid, or the greater part of them, at all times thereafter should have power and authority to choose, nominate and appoint a mayor; and afterwards, "that the mayor and recorder of the borough aforesaid for the time being, and in his absence his deputy, and the aforesaid chief burgesses of the common council of the same borough for the time being, or the greater part of them, were from thenceforth for ever thereafter to have the power of nominating and appointing other officers." No distinction is made there between the twelve and the twenty-four; it seems to give the right to the whole collective body, not distinguishing between the different classes of which that body is composed, but giving the right to the whole as a mass. In the case of *Rex v. Devonshire (a)*, the point did not of necessity arise. It was scarcely raised in that case, that the right of electing a chief burgess was in the residue

(a) 3 D. & R. 63; 1 B. & C. 609; *Ante*, 368.

of the chief burgesses remaining. There was a provision in the charter, that on many occasions two aldermen should be present. Of the chief burgesses there were four who were aldermen; and it was clear that two aldermen were present. In that case it was not put on the ground, that it was essential to have a majority of those chief burgesses that were aldermen, and in addition to that, a majority of those chief burgesses who were not aldermen. Although the necessity of having two aldermen was contended for, it was upon that clause of the charter which said, that upon certain elections two aldermen should be present; but it seems never to have been suggested, that the concurrence of these aldermen was in that case in any degree regarded. For these reasons I am of opinion that the construction of this charter does not raise a reasonable degree of doubt upon the subject. In this case we have no evidence of what the usage under these charters has been; but that, I think, does not raise such a degree of doubt as to justify us in granting the application. With reference to the other point, if Mr. *Campbell* wishes it, this rule may be enlarged, and the parties who have been re-elected may enter a formal disclaimer to any *quo warranto* information that may be filed against them (a) between now and Easter Term.

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HOLROYD, J.—I think this is a very short and plain question. If any reasonable doubt arose on it we should be bound to grant a *quo warranto*. That does not appear to me to be the case, taking the charters on the construction that is to be put on them independently of usage, with regard to which there is no affidavit; nothing to shew what was the usage or constitution of the borough, previously to the time when the charters were granted, or

(a) In order to enable persons who have usurped offices to disclaim, there must be a separate information against each usurper; *Res v. Warlow*, (Borough of Pembroke), 2 M. & S. 75.

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what usage has been adopted since, with regard to the construction that has been put upon them (a). The question arises on the power of electing the chief burgesses; and by the charter the election of the chief burgesses is to be by "the mayor and recorder for the time being, and in his absence, his deputy, and the aforesaid chief burgesses" (which were thirty-six) "of the common council of the same borough for the time being, or the greater part of them." Then it is insisted, that the common council was composed of two classes of persons, one, chief burgesses councillors, and the other, chief burgesses, and that there must be a majority of each of those bodies. It appears to me that the charter does not require that there should be a majority of each of those bodies; that every word of the charter is followed by considering that it is sufficient that besides the mayor and recorder, there should be a majority of the thirty-six chief burgesses; because the power of election is given to them or the major part of them. If it were to be in any other way it would, to be sure, be requisite there should be a majority of each; and the different parts of the charter which mention what is to be done by chief burgesses councillors, specifically do so.

LITLEDALE, J.—I am entirely of the same opinion. In general, in charters there is a distinct declaration that there shall be one mayor, and that there shall be either twelve aldermen or twelve chief burgesses, or some definite number of those persons who are generally called common council, recognizing the existence of distinct and separate bodies. That, however, is not the case in either of the present charters. It seems from the recital in the charters, that this is a corporation by prescription, and it does not refer to any two particular modes

(a) See *Powell v. Regem*, in error, (Borough of Brecknock), 2 Brown, P.C., 2d edit. 298; *Res v. Varlo* (Borough of Portsmouth),

Cowp. 248, 50; *Res v. Bellringer* (Borough of Bodmin), 4 T.R. 810, 821; *ante* 381; Selw. N. P. 8th edit. 1153.

in which these people are to be treated, whether as separate bodies, or whether as entirely composing one class, which is in general called the common council. There might have been an affidavit on the part of the relator, the person who applies for this rule, to shew what the usage, of the borough had been prior to the granting of the charter of *James I.* It might have shewn, at all events, that at the corporation meetings which have been held, the practice has been, that there should be a majority of twelve chief burgesses councillors. That would recognize it as a distinct and separate body from the other twenty-four. Although in general they compose the common council, or part of the burgesses, from the language of the charter, it does not appear very clearly, whether the town clerk, or recorder, in the second charter, are to be part of the common council or not. There is, however, no affidavit stating what the usage has been; whether to treat them as separate integral parts of the corporation or not. It is left, therefore, quite at large; and consequently, we must give our opinion on the construction taken on the charter itself. Now it is to be observed there is a material distinction between the charters of *James I.* and *Charles I.* each of them, with reference to the election of the mayor, speaking of the town-clerk and thirty-six capital burgesses of the said borough, being the common council of the said borough. There it mentions them as merely being the thirty-six common council of the borough. "They shall have power to elect and choose one honest and discreet man, of the number of twelve chief burgesses councillors of the borough aforesaid, who shall be mayor." The language of the charter of *Charles I.* is the same, "who are to be the common council," that is, the recorder and thirty-six, either with or without him, "and the chief burgesses being the common council of the borough, of which chief burgesses some were called, known, or distinguished by the name or distinction of chief burgesses councillors of the borough aforesaid, or

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the greater part of them." Now it is to be observed, that possibly some ambiguity, although I think not much, might arise, if that charter of *Charles I.* had stood alone; because it says, "of which chief burgesses some are called, known, or distinguished by the name or distinction of chief burgesses councillors." But in the prior charter of *James I.*, which, one would suppose, referred to the ancient antecedent usage of the borough, it does not there say, "of which chief burgesses some are called, known, or distinguished by the name or distinction of chief burgesses councillors." There it only says, that they are to "choose, nominate, and assign, an honest and discreet man, of the number of twelve chief burgesses councillors." Therefore, the recognition in the time of *Charles I.*, goes further than it does in that of *James I.* These words in the charter of *Charles I.*, are not sufficient to make the distinction contended for, and to constitute them an integral part under that charter, when they were not so under the charter of *James I.* There is also another distinction between the two charters. In the charter of *James I.*, when it comes to the power to impose fines for not accepting offices, and also to make bye laws, then the power is 'given to the mayor and town-clerk, and chief burgesses councillors and common council of the borough. In the charter of *Charles I.*, there is nothing said about chief burgesses councillors and the common council. It there says, "it shall be in the mayor, the recorder of the borough;" and, therefore, there certainly is an ambiguity in the charter of *James*. It is, at all events, an inaccurate expression to say, "chief burgesses councillors and common council of the borough," because the common council of the borough was before declared to consist of thirty-six (a). It seems to exclude the other, by saying the common council, after mentioning the burgesses. There are also in this charter, various powers given to the mayor, and to the twelve

(a) *Ante*, 347.

burgesses councillors, as distinct from the rest of the council; and there being that distinction, and some powers given to them to do particular things, when in the power of electing the mayor and other officers, they are designated as an entire body of thirty-six, it seems to me, that we are not to consider the thirty-six as being composed of two integral parts. This is not the way in which integral parts are usually mentioned. If it had been said, "the mayor and the recorder, and the chief burgesses, and the chief burgesses councillors of the borough," that would clearly have made them a distinct integral part, and it would have required a majority of each. Instead of that, it is put in even the charter of *James I.*, "the chief burgesses of the borough" generally; and in the other, the chief burgesses of the borough, of whom some are called or distinguished by the name or distinction, not as having any distinct office, but called or distinguished by the name of the chief burgesses councillors; not mentioned as constituting an integral part. That being so, the charter does not go on to give the power to the chief burgesses councillors, and the rest of the chief burgesses; but it is to the thirty-six chief burgesses; by that expression, putting it on the number itself, and not on the two constituent parts. All that is required there is, that there should be a majority of the thirty-six. That having been the case in this instance, it appears to me the rule should be discharged, except as to claiming the franchise between the 1st of August and the 8th of October.

Campbell—It would be of no advantage to my client to make the rule absolute as to that.

BAYLEY, J.—Then the better way will be, to discharge the rule, without costs.

Rule discharged (a).

(b) And see *Res v. Grampound*, 17; Selw. N. P. 8th edit. 1154; 6 T. R. 301, 2; *Res v. Morris*, *Res v. R. Davies* (Town-Clerk of Borough of Weymouth), 4 East, Wells), *post*.

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SHANNON v. OWEN, CHAMBERLAYNE, LLOYD, DONNOLLON, COHEN, FROGLEY, AND COLLYER.

In trover for a ship "with the apparel and appurtenances thereto belonging," the plaintiff cannot set up a distinct title to a new boat and cordage.

TROVER, for "two fishing-smacks, with the apparel and appurtenances thereunto belonging." Plea— not guilty. The record contained the entry of a nolle prosequi as to *Chamberlayne*, and a suggestion of the death of *Donnollon*. At the trial of the cause at the last Chelmsford Spring Assizes (*a*), before *Alexander*, C. B. (*b*), it appeared that the plaintiff was the registered owner of the fishing-smack, *Alexander*, of the port of London. The first three defendants, *Owen*, *Chamberlayne*, and *Lloyd*, were the assignees of the defendant *Cohen*, who was formerly owner of the *Alexander*. The defendant *Donnollon* was the solicitor to the commission issued against *Cohen*, on the 20th of May, 1813, and also solicitor to the assignees. The defendant *Frogley*, had been formerly master of the vessel, and defendant *Collyer* was *Donnollon's* clerk. In March, 1813, defendant *Cohen* sold the *Alexander* to *Phillips*, for 900*l*. The bill of sale bore

(*a*) Counsel for the plaintiff, *Taddy*, Serjt., and *Chitty*; for the defendants, *Marryat*, and *Gurney*.

(*b*) This cause was first tried before *Park*, J., at the Chelmsford Summer Assizes, 1822, when a verdict was found for the plaintiff, the defendants not having proved petitioning creditor's debt to the satisfaction of the learned Judge. That verdict having been set aside, the cause came down for trial at the Spring Assizes, 1823, when the trial was postponed on account of the illness of the defendant's attorney. At the ensuing Summer Assizes, a verdict was found for the defendants; but a bill of exceptions was tendered to the opi-

nion delivered by the learned Judge, Mr. Serjt. *Onslow*, as to the sufficiency of the act of bankruptcy, which consisted in *Cohen's* absenting himself from his counting-house, and directing his clerk to say, that he had been there at the time he was so absent. Upon a writ of error in the Exchequer Chamber, that Court was of opinion, that though there was sufficient evidence that *Cohen* had absented himself with intent to delay his creditors, that intent ought to have been found by the jury, and should not have been decided by the learned Judge, as a point of law; and a *venire de novo* was awarded.

date, 23d April, 1813, and on the 29th of that month, *Phillips* obtained register in his own name, on delivering up to be cancelled the former register granted to *Cohen*. *Cohen's* assignees conceiving this sale to be fraudulent, in June, 1814, seized the vessel, the possession of which was, however, given back to *Phillips*, upon his depositing the bill of sale, to abide the decision of the question, as to the validity of his purchase. The vessel remained in the possession and employ of *Phillips* for nine months, at the expiration of which, he sold her to the plaintiff for 735*l*. A bill of sale was accordingly executed, and a fresh register obtained in the name of the plaintiff, in whose employ the vessel continued about two years and a half; during which period, the plaintiff supplied her with a boat and some new cordage, which remained coiled on the deck till the vessel was again seized by the defendants; and upon this seizure, the action was founded. The vessel was afterwards removed by the defendants into the Surrey Canal, where she lay until she was sold for her expenses.

On the part of the defendants it was contended, that the transfer to *Phillips* was fraudulent; and they proved also an act of bankruptcy overreaching the bill of sale.

On the part of the plaintiff, however, it was insisted, that he was, at all events, intitled to recover for the value of the boat and cordage; the former of which was only three months old, and the latter quite new. The learned Judge being of this opinion, a verdict was returned for the plaintiff for the amount.

In Easter Term, *Marryat* obtained a rule *nisi* for a new trial, on the ground that the plaintiff by his declaration claimed nothing but what was appurtenant to the ship, and passed with it—against which

Taddy, Serjt., and *Chitty*, now shewed cause (a). The

(a) *Taddy*, Serjt., wished to put allowed, the defendants having in affidavits; but this was not moved without affidavits.

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jury have found a verdict for the plaintiff, as to the boat, sails, and cordage; and the words, "apparel and appurtenances," are a sufficient description of these articles, and are so used in declarations in the Pleader's Assistant, and the old entries. The terms used in 53 Geo. 3, cap. 159, sect. 7, for limiting the responsibilities of ship-owners, are "the value of the ship or vessel, with all her *appurtenances*." They are merely the "*adjuncta*," of the civil law. If they had been inseparable from the vessel, it may be admitted, that the plaintiff could not, by adding to the principal, have prevented the assignees from asserting their rights, founded upon the invalidity of the sale from *Cohen* to the plaintiff. The articles in question were not substituted for others which had been worn out, but were additions made by the plaintiff.

Marryat, contra, was stopped by the Court.

LORD TENTERDEN, C. J.—This is an action for the recovery of a "smack and its appurtenances." No one could suppose that the plaintiff was suing for any thing distinct from the vessel. For the purpose of sustaining his declaration, the plaintiff is obliged to admit that the articles belonged to the vessel.

Rule absolute.

ANN WILLIAMS v. GEORGE GERMAINE the elder.

Where B. accepts a bill for the honour of the drawer, on the refusal of A., the drawee, it must be presented again to A. for payment at maturity, before B. can be charged on his acceptance; even in the case of a bill payable after sight.

7 Nov. 485.
 ASSUMPSIT, on a (third) bill of exchange, drawn 29th April, 1826, by *George Germaine* the younger, at *Sierra Leone*, on *Pugh* and *Redman*, for 7l. 11s. 9d., payable thirty-six days after sight to the order of *Henry Williams*, for disbursements of the ship *Edward*, under the drawer's

command; and indorsed by *Henry Williams* to plaintiff. Averment, that afterwards, and before the payment, &c., to wit, on the 28th day of July 1826, at, &c. the said bill was duly presented and shewn to the drawees thereof, for their acceptance thereof, and the said drawees then and there had sight of the said bill, and were then and there requested to accept the same, according to the said usage and custom; but that the said drawees of the said bill did not, nor would, at the said time when the said bill was so presented and shown to them for their acceptance thereof, as aforesaid, or at any time before or afterwards, accept the same, or pay the said sum of money therein mentioned, or any part thereof, but wholly refused and neglected so to do; neither did nor would they, then, or at any time afterwards, accept or pay the said first and second of exchange, in the said third bill of exchange mentioned, or either of them, but therein wholly failed and made default; whereupon the said bill afterwards, to wit, on, &c. at, &c. was *duly protested for non-acceptance thereof* by the said drawees according to the said usage, &c. Of all which several premises defendant afterwards, to wit, on, &c., at, &c., had notice. And thereupon, afterwards, to wit, on, &c., at, &c., defendant, in order to prevent said bill being sent back and returned to said drawer thereof, did, under the said protest (a) so made as aforesaid, accept said bill, according to the said usage, &c., and then and there made the same payable at a certain place in the said acceptance mentioned, to wit, at No. 6, &c. And the said plaintiff further says, that afterwards, and when the said sum of money in the said bill specified became due and payable, according to the tenor and effect thereof,

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(a) "*Qui in honorem trassantis, litteras cambiales ad se non directas acceptavit, perinde ac ipse trassatus tenetur. Sed et ipse, prestita solutione, persecutionem ex cambiali jure habet adversus trassantem, ad recuperandam summam*

solutam cum provisione et impensis. Quem in finem hæc acceptatio non aliter fieri solet, quam supra protesto." Haineccius, (vol. vi. 39;) *Elementa Juris Cambialis*, cap. vi. sect. 9.

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and of the said defendant's acceptance thereof as aforesaid, to wit, on the 22d day of August, in the year 1826, aforesaid, to wit, at, &c., the said bill so accepted and indorsed as aforesaid, was duly shown and presented at the said place, in the said acceptance mentioned, according to the said usage and custom, and payment of the said sum of money therein mentioned, was then and there *duly demanded*, according to the tenor and effect of the said bill, and of the said defendant's said acceptance thereof, and of the said indorsement so made thereon, as aforesaid, but that the said defendant did not, nor would, neither did nor would, any person, either on account of the said drawer, or for or on account of the said defendant, at the time when the said bill was so shown and presented for payment thereof, as aforesaid, or at any time afterwards pay the said sum of money therein specified, or any part thereof; but, on the contrary thereof, wholly refused so to do, and therein wholly failed and made default of all which several last-mentioned premises the said defendant afterwards, to wit, on, &c., at, &c., had notice. By reason whereof, and according to the said usage and custom, the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said bill specified, when he, the said defendant, should be thereunto afterwards requested; and being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on, &c., at, &c., undertook, &c., to pay the said plaintiff the said sum of money, in the said bill specified, when the said defendant should be thereunto afterwards requested. The second count differed from the first, in stating the acceptance, *supra* protest, as an acceptance to pay generally. The third count omitted the allegation of the presentment for acceptance to the drawees, but stated a special acceptance for the honour of the first indorser, as in the first count. The fourth count varied from the third, by stating a general acceptance *supra* protest.

Plea, non-assumpsit. A verdict having been found for the plaintiff at the sittings at Guildhall, after last Michaelmas Term (a), before Lord *Tenterden*, C. J., a rule nisi to arrest judgment was obtained by *Parke* in Hilary Term last, on the authority of *Hoare v. Cazenove* (b).

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Campbell now shewed cause. The plaintiff is entitled to judgment upon three grounds. First:—In no case where there is an acceptance for honour, is a presentment to the drawee necessary, his engagement being absolute. Secondly:—This case is distinguishable from *Hoare v. Cazenove*; for supposing that it is necessary to present where the bill is payable after date, it is not so where the bill is payable at sight. Thirdly:—Upon this declaration a presentment, if necessary, must be presumed after verdict; because without such proof, the plaintiff could not have recovered. Upon the first point, it must be admitted, that the plaintiff has a formidable obstacle in *Hoare v. Cazenove*; but the reasons assigned by Lord *Ellenborough*, are not satisfactory. *Ex vi termini* the acceptor is in a totally different situation from drawer or indorser. The defendant would put the acceptor in the same situation as the drawer or indorser, and not liable until default made by the drawee. It is contended, that the holder must first present to the drawee, then to the acceptor for honour. *Hoare v. Cazenove* was decided upon authorities which do not seem to bear out the proposition. *Beawes* (c) cited there is an authority expressly in favour of the plaintiff. His words are:—"He that accepts a bill, *supra* protest, put himself absolutely in the stead of the first designed acceptant, and is obliged to make the payment without any exception; and the possessor hath the same right and law against such an acceptor, as he would have had

(a) Counsel for the plaintiff, *Scarlett*, A. G., and *Campbell*; for the defendant, *Parke*.

(b) 16 East, 391.

(c) *Lex Mercatoria*, 421, pl. 23; (edition 1752, p. 419.)

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against the first intended one, if he had accepted" (a).— [Littledale, J.—Does he cite no authority?] He speaks from experience (b). In opposition to the authority of *Beaves*, were cited (c) *Lewin v. Brunetti* (d), *Malyne* (e) and *Pothier* (f). *Lewin v. Brunetti* was an action by the

(a) So, Heineccius (*ante* 395 n.)

"*Qui in honorem trassantis, literas cambiales ad se non directas acceptavit, perinde ac ipse trassatus teneatur.*" So, Phoonsen (*Lois et Coutumes du Change des principales Places de l'Europe*, chap.

12, sect. 18). "When the holder of a bill of exchange, or any other person, accepts a bill of exchange, *supra* protest, he places himself absolutely in the situation of him upon whom the bill is drawn, and is bound to pay it at all events (*Il se met absolument à la place de celui sur qui la lettre est tirée, et il est obligé de la payer, sans que rien l'en puisse garantir*)." And the holder of the bill has the same rights against such acceptor *supra* protest, as he would have had against the person upon whom the bill was drawn, if he had accepted it". So, Baldasseroni (*Leggi e Costumi del Cambio, parte 2. articolo 29*). "He who accepts for the honour of the signature (*per onor di firma*), makes himself debtor of the payment of the bill in the same manner as the drawee would have been if he had accepted (*si costituisce debitore della soddisfazione della tratta, ugualmente che lo sarebbe il trattario accettante*). So, by section 5 of "The Laws and Customs of Exchange at Antwerp," cited by Ricard in the Appendix to his translation of Phoonsen's Treatise. So, by sect. 9 of "The Ordinance of Exchange of the city of Hamburg." *ib.*

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(b) Though *Beaves* cites no authorities, he may have been acquainted with some of the regulations mentioned in the preceding note, or indeed with the first two text writers, both of whom wrote before *Beaves*. And see post 399 (d).

(c) 16 East, 391; post, 402.

(d) 1 Lutwyche, 896.

(e) Page 273.

(f) *Traité du Contrat de Change*, partie 1, chap. 5, sect. 2, No. 137.

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first indorser who had paid, without having accepted the bill at all. [*Littledale, J.* There the bill was presented to the original drawee. The old way was to state the custom as applicable to the particular case. *Nelson* says of *Lewin v. Brunetti*, "this is only a hearsay report which the Serjeant (*Lutwyche*), had *ex relatione* of his brother *Girdler (a)*."] In *Lewin v. Brunetti*, the question was, whether the declaration contained a sufficient averment of a payment of money by the last indorsee. It is true that the custom was set out; and Lord *Ellenborough* says, that no objection was taken to it; but, in fact, no such objection could have been taken (*b*). In the passage first cited from *Malyne (c)*, by Lord *Ellenborough (c)*, he is not speaking of a protest to be made to the acceptor; he adverts only to what it is necessary for the party who has paid for honour. This passage only shows what the acceptor for honour is to do (*d*). *Pothier* is discussing a totally different question. Both in No. 137 and 138, he is considering what is to be done by the holder, in order to preserve his rights against other parties. He is considering the distinction between the "*personne indiquée*," and the acceptor for honour. These are the authorities cited in *Hoare v. Cazenove*. The only authority which applies is expressly in favour of the plaintiff. The other two are doubtful. The presentment for payment must be made on the day on which the bill becomes due. How can two parties be called upon on the same day, unless both happen to live in the same place. [*Bayley, J.* This is the case in all acceptances payable in London]. One party might be in a remote part of the country, or in a foreign kingdom, yet if the bill was not presented on the day of maturity, all parties would be

(a) *Nelson's Lutwyche*, 276.

(b) *Post*, 401, (*d*).

(c) Page 273; 16 East, 396.

(d) "*Quid, si mercator detractans initio acceptationem, veniente tamen*

die nihilominus solutionem præstat?
Tunc exactor illam recipere non tenetur, nisi trassatus simul restituat impensas in protestatione factas."
Heinecc. El. Jur. Camb. c. 4, s. 30.

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discharged. [*Littledale, J.* Taking the whole of the two paragraphs in *Pothier*, I collect that he means that a presentment to both is necessary to charge other persons]. Secondly—A distinction may be taken, if necessary, between a bill payable after sight, and a bill payable after date. In *Hoare v. Cazenove*, the bill was payable 130 days after date. If a bill is payable after sight, it becomes due with reference to the period of its presentment; but as against the acceptor for honour, the time runs from the acceptance. That case is, in fact, an authority in favour of the plaintiff. It was proved at the trial, that the bill was presented to the drawee on the same day on which it was presented to the defendant. This would be a presentment ten days after the bill became due, reckoning from the presentment for acceptance. Thirdly, If any presentment was necessary, it must be presumed after verdict. After verdict, this declaration is quite sufficient. The objection applies equally to want of protest as to want of presentment. The declaration states, that the drawees had sight of the bill, and were requested to accept, and that they did not accept or pay. "Neither did they then, or at any time after, accept or pay." This is a positive allegation, that the drawees refused to pay. It is reasonable to infer a demand (a). [*Bayley, J.* In *Rushton v. Aspinall* (b), non-payment was alleged, but the want of an allegation of a demand and a refusal was held not to be cured by verdict, and the judgment was reversed]. It is stated in this declaration, that the bill when due was *duly* shown and presented to the acceptor. Now if a presentment to the drawee was necessary, it could not have been *duly* presented to the defendant unless there had been a previous presentment to the drawees. It is alleged that the defendant became liable to pay by the custom of merchants, and that being so liable, he promised. Supposing this would have been had upon

(a) And see *Butterworth v. Lord*
de Despenser, 1 M. & S. 151.

(b) Douglas, first edition 653,
 second and subsequent edition 679.

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demurrer, or after judgment by default, it is cured by verdict. So in *Salomons v. Stavely* (a), the omission of averment of a protest, was held to be matter of special demurrer only; though the action was against the drawer, and the protest is part of the custom, as the presentment is here. That gets rid of the defendant's objection for want of a protest. The cases as to the effect of a verdict in curing defects in declarations, are collected by Serjeant *Williams*, in his note to *Stennell v. Hogg* (b). After a verdict upon this declaration, it must be presumed that the necessary evidence was given.

Parke, contrà. The only question before the Court is, whether *Hoare v. Cazenove* is good law. That case was very carefully considered, and the Court pronounced an elaborate judgment. It is of great importance that decisions upon points of commercial law should be adhered to (c). No authority has been cited but what was fully considered in *Hoare v. Cazenove*. Lord *Ellenborough* there says, I am aware that *Beawes*, in his *Lex Mercatoria*, says, "he that accepts a bill upon protest, puts himself absolutely in the stead of the first acceptant, &c." (d). *Pothier* is comparing that case with another, where a difference of opinion existed; and he considers it necessary to present to the drawee, as well as to the acceptor, for honour. I cannot find any authority opposed to this (e). In *Lewin v. Brunetti*, if the custom had not been so considered, it would not have been so stated. [*Littledale, J.* It only alleges that so and so was done, not that it was necessary to be done (f)]. The forms of declarations are evidence of the law. [*Littledale, J.* That is not so here. Lord *Tenterden, C. J.* The affirmative proposition does not neces-

(a) Dougl. 684, n. 144, 2d edit.

(b) 1 Saund. 228; and see those cases more fully stated, *ante*, 285.

(c) *Vide* 2 Burr. 887, *ad idem*.

(d) *Ante*, 397.

(e) *Vide tamen ante*, 398 (a), 399 (d).

(f) The custom there stated is

so precisely fitted to the occasion, that it even embraces the exact number of indorsements occurring in that particular case. No objection could have been taken to the declaration on this ground, as the custom, no doubt, extended to a bill with five indorsements, though it

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sarily lead to the conclusion, that such an allegation was necessary. *Bayley, J.* In *Hoare v. Cazenove*, the bill contained a reference to the defendants in case of need; and it might be necessary in that case to present to the drawee, in order to ascertain whether need existed]. The question is, whether this was an absolute or a conditional acceptance; and whether the bill being payable after sight makes any difference.

Cur. adv. vult.

The Judgment of the Court was afterwards delivered by Lord TENTERDEN, C. J., who after adverting to the form of the pleadings, thus proceeded:—The objection taken on the part of the defendant, in arrest of judgment, was, that when the bill of exchange became due, it was not presented for payment to the drawee; and was not protested for non-payment by the drawee; and in support of this objection, the case of *Hoare v. Cazenove* was cited, and relied on. That case underwent great consideration; and the Court, for reasons clearly and forcibly explained by the learned Judge who delivered the judgment, did decide in favour of the objection raised in this case. Much has been addressed to us to shew that that judgment ought not to be adhered to; and if it could be shewn that it was founded in a mistake of the law, we should be bound to decide otherwise; but unless we are perfectly convinced that the opinion of the Judges at that time presiding in this Court was wrong, we certainly ought not to overrule such a solemn decision, or disturb a rule once laid down and acted upon. We are by no means so convinced; on the contrary, if the point were new, I am not prepared to say I should not have come to the same decision. We think the just and proper rule in cases of this description is, that the holder of a bill of exchange of this kind is bound to do all that may be necessary to enable the acceptor for honour, in case of his being sued would have applied equally to a bill presentment, could not have been objected to, had it been ever so clear that no second presentment was necessary.

upon his acceptance, to recover over; for if you could recover against the acceptor for honour, upon less evidence than would enable him to recover over, there would be great injustice. The proper effect of the transaction seems to us to be, that an acceptance for honour is not absolute, but conditional only; and that all that an acceptor for honour means by his acceptance, is to say this, "do not return the bill; present it to the drawee for payment when it becomes due, and then if he does not pay it, I will." This is a very sensible interpretation of the liability. You ought to have presented this bill to the persons on whom it is drawn. For these reasons, we are of opinion that the objection taken in this case, is fatal to the action; and consequently, that the rule for arresting the judgment ought to be made absolute.

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Judgment arrested.

WILLIAMS v. GERMAINE the younger.

THIS was an action against the drawer of the bill mentioned in the last case. The declaration contained four special counts, corresponding with those in *Williams v. Germaine* the elder (a), but adding an allegation of non-payment by the acceptor for honour in those counts (the 2d and 4th), which in that declaration contained no such allegation, and stating in all, that after the dishonour of the bill by the acceptor *supra* protest, the defendant had notice of the presentment, but not stating specifically that the defendants had notice of the refusal of acceptance by the drawees, or that the bill was *protested* (b) for non-payment by the acceptor *supra* protest. A similar rule *nisi* to arrest the judgment having been obtained in this case also,

A bill accepted for the honour of the drawer, on the refusal of the drawee, must be presented to the drawee at maturity, before the drawer can be charged; a presentment to the acceptor for honour only is not sufficient.

(a) *Ante*, 394.

(b) As the declaration averred that the defendant had notice of non-payment, the omission to state that such notice was conveyed

through the medium of a protest, would only be ground of especial demurrer, *Dunstar v. Pierce*, Lill. Entries, 55; *Salomons v. Stavelly*, Doug. 684, n. 144; Bayl. 189.

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Campbell now shewed cause. It is said that the declaration contains no averment of notice. The statement is, that the acceptor for honour did not pay; of all which premises defendant had notice. He had notice that the acceptor for honour had dishonoured the bill. [*Bayley, J.* My difficulty is, whether you ought not to give immediate notice of dishonour upon a refusal to accept]. The declaration alleges presentment to the acceptor for honour. If the acceptor for honour is substituted for the drawee, then his engagement is absolute. In this case, also, the omission is cured by verdict.

Parke, contrâ. *Pothier* is an authority for the defendant in this case also. In *Mutford v. Walcot (a)*, it was held, that if *A.* draw upon *B.* who will not accept, and *C.* offers to accept for the honour of *A.*, the holder need not acquiesce, but may protest, but that if he do acquiesce he is bound. The object of the acceptance was to prevent the bill from going back with expenses upon it.

Cur. adv. vult.

The Court afterwards ordered the judgment to be arrested on the same grounds as in the other action; which rendered it unnecessary to consider the further objections taken to this declaration (*b*).

(*a*) 1 Lord Raym. 575; 12 Mod. 410; 1 Comyns's Rep. 76.

(*b*) And see Bayl. 69; Pardessus, Cours de Droit Commercial, 1 vol. 410. Although the latter author has a section devoted to "acceptation par intervention," and points out the distinctions between the acceptance of the drawee, and that

of a third person intervening for the honour of the drawer or indorser, he is wholly silent upon the question, whether the engagement of the "accepteur intervenant," is direct or collateral, absolute or conditional. *Vide ante*, 398 (*a*), 399 (*d*)

WILTSHIRE v. SIDFORD (*a*).

THE declaration stated, that the defendant, on the 1st of January, 1826, and on divers other days and times, &c., broke and entered a certain close of the plaintiff,

(*a*) This and the following cases were argued before the three judges sitting in the bail Court, under his

majesty's warrant, by virtue of 3 Geo. 4, c. 102.

Trespass does not lie by one part-owner of a party-wall, against the other part-owner.

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situate, &c., at Wilton, in the county of Wilts, and then and there erected and built, put and placed, and caused and procured to be erected, &c., divers, to wit, five walls, five cart loads of bricks, five cart loads of stone, five cart loads of timber, and five cart loads of materials, in, upon, and over the said close, and in, upon, against, and over divers, to wit, two walls of the plaintiff, then standing and being, in and upon the said close, and kept and continued, &c. the said walls, so there put, placed and erected, without the leave or licence, and against the will of the plaintiff, for a long space of time, to wit, from thence hitherto, and thereby, &c. Second count charged that defendant, on, &c., at, &c., put, placed, &c., divers, to wit, five cart loads of bricks, &c., in, upon, and against divers, to wit, two walls, two dwelling houses, two erections, and two buildings of the plaintiff, there then standing and being, and kept and continued the said bricks, &c.; and thereby, &c. Plea—not guilty. At the trial at the last Salisbury assizes^(a), before *Burrough*, J., it appeared that the plaintiff was the owner of a house at Wilton; and that the defendant having purchased an adjoining house, in 1826, pulled it down and rebuilt it; and in so doing, built upon and against a wall which the plaintiff claimed as being exclusively his. Contradictory evidence was given as to the former enjoyment of the wall; but the plaintiff's house projected into the street, and being thereby deeper than that of the defendant before the rebuilding of the latter, no evidence could be produced by the defendant of any former use of the quoins. These quoins, which appeared to be upwards of 100 years old, projected before and behind the plaintiff's house, and had been repaired by him exclusively; a part of the defendant's new house was placed upon four inches of the quoins. The learned Judge reported, that he had told the jury, that if they were satisfied that there was but one

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(a) Counsel for the plaintiff, the defendant, *Wilde and M'cre-Erskine*, Bayly, and Carter; for wether, Serjts. and Jeremy.

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wall, and *that* a party wall, both parties were so interested, that neither could maintain trespass against the other. The jury, some of whom the learned Judge understood had had a view (a), said, that they considered it a party wall; and a verdict was entered for the defendant (b). *Erskine*, in last term, obtained a rule for a new trial upon the grounds of misdirection, and upon affidavits which being afterwards found to be insufficient to support the application, were abandoned.

Merewether, Serjt., and *Jeremy*, who were to have shewn cause, were stopped by the Court.

Erskine, *Bayly*, and *Carter*, in support of the rule. The sole question was, whose property the land was on which the wall was built. [*Holroyd*, J. Before the Statute (c) of Frauds, the wall might have been made joint property by parol. *Bayley*, J. You were bound to shew that the defendant had built on the plaintiff's land.] In *Matty v. Hawkins* (d), the court of Common Pleas held, that if two persons have a party wall, one half of which stands on the land of each, they are not tenants in common of the wall, or of the land on which it stands. The learned judge did not leave it to the Jury to consider whose land the wall was built on. [*Bayley*, J. He told them he could not distinguish between the property of the wall and the soil. *Holroyd*, J. If a row of houses is built, and the owner of the whole conveys separate houses to different persons, does not an undivided interest in the whole party-wall pass? Suppose the wall to have been built at first by the owner of one of these houses, the owner of the adjoining house could not use the wall, as in this case it

(a) There had been a view by seven, but none of these were sworn on the jury, the first viewer happening to be the thirteenth person whose name was called.

(b) It afterwards appeared, that there being considerable difference

of opinion among the jury, they agreed by way of compromise, to return that it was a party wall, under an impression that each party would have to pay his own costs.

(c) 29 Car. II. c. 3. (1676.)

(d) 5 Taunt. 20.

has been used. Therefore, there may have been an agreement; since *omnia præsumentur ritè esse acta*. Bayley, J. It might be that the owner of the wall had conveyed.] If it had been left to the jury to presume a conveyance, the plaintiff could only have moved on the ground that the verdict was against the evidence; which would not have been worth while. The question left to the jury should have been, whether the wall was built on the plaintiff's land; and not merely whether it was a party wall. The learned Judge was requested to ask the jury, what they meant by a party wall; but his Lordship said the question was unnecessary. Part of the trespass was committed on the quoin, which was shewn to be at a great distance from the spot where the persons under whom the defendant claimed were supposed to have used the wall. By a party-wall, is commonly understood, a wall belonging to each adjoining proprietor, *usque ad medium filum*. [Holroyd, J. In that case either party could remove the wall.] The same inconvenience was pointed out in *Matty v. Hawkins* (a).

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BAYLEY J.—I am of opinion that there ought not to be a new trial. The plaintiff was bound to make out his case. I agree with what was decided in *Matty v. Hawkins*. There the quantity of land which each party contributed was known; but where it is not known under what circumstances the wall was built, we are not bound to draw the same conclusion as was drawn in *Matty v. Hawkins*, but may come to a more reasonable conclusion. When the builder of two houses grants off one, it is more reasonable to presume he grants the whole wall in undivided moieties, than that he should leave to either party the power of cutting the wall in half (b). That would be the case if the houses were built by one and the same person. If two persons built at the same time, the probability is, that they would take a conveyance of an undivided moiety of the ground on which the wall was

(a) 5 Taunt. 29. (b) As was done in *Wigford v. Gill*, Cro. El. 209.

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to be erected, in order that the property might afterwards be kept in the same state. The quoin was a continuation of the wall, and it would have been an outrageous act on the part of the jury, to make a distinction between the quoin and the wall. I cannot in substance see any distinction.

HOLROYD, J.—If the jury had sufficient evidence to lead to the conclusion at which they have arrived, we ought not to disturb the verdict. There was evidence of this being a party wall; the occupation of the wall was for the benefit of both houses. The presumption is, that the wall of both houses was the undivided property of both. If not, the plaintiff might have cut down half the wall, without being a trespasser; and a wall of half the thickness might not stand (a). It must be taken *prima facie*, to be the undivided property of both.

LITTLEDALE, J.—It was necessary for the plaintiff, to shew an exclusive right of possession (b). Two things were left for the jury, namely, whether there was more than one wall, and if not, whether that was not a party-wall. The plaintiff says, the Judge has misdirected the jury, in not drawing their attention to the property in the soil, and *Matty v. Hawkins* has been referred to. To that case, I certainly subscribe; the property in the wall follows the property in the land. It does not follow that either party might pull the wall down, for each has a right to use the property of the other (c). It would have

(a) *Wigford v. Gill*, Cro.El.269.

(b) *Butcher v. Butcher*, ante, 220.

(c) Supposing the respective proprietors of adjoining houses, to be each tenant in severalty of his own moiety, with cross easements in the moiety of the other, if either party took down his own moiety, he would be liable to an action on the case for any injury which might thereby result to his

neighbour; and this in some cases might be more beneficial than a tenancy in common; for upon such tenancy in common being destroyed upon a writ of partition (which, being a writ of right, and not of grace, either party, it is conceived might prosecute), it would seem that the other would have no protection against the injury which was inflicted in *Wigford v. Gill*.

perplexed the jury, to have left the question as to the *right of soil* to them. In this case the plaintiff may have been the owner of the whole soil, or each may have been owners of a moiety of the soil (a), or they may have been tenants in common. The jury, by finding that it was a party-wall, have negatived an entire property in the plaintiff. If they were tenants in common of the soil, the conclusion is right. But it is suggested on the part of the plaintiff, that it ought to have been left to the jury to say, whether each party was not the owner *usque ad medium filum*. It lay upon the plaintiff to show that he had such an interest. It is said that the quoin shews this; but the defendant cannot claim a zig-zag line. The houses may have been originally built before the Statute of Frauds (b), in which case, no conveyance in writing would have been necessary to the passing of an interest in the wall.

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Rule discharged.

(a) *Butcher v. Butcher*, ante, 220. (b) 29 Car. 2, cap. 3. (1676).

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11. 7 84 537.
TRESPASS for entering plaintiff's house, and taking his goods. Plea, not guilty. At the trial before *Burrough*, J., at the last Bodmin Assizes (a), it appeared, that *Bramwell*, the plaintiff, an attorney, practising at Penzance, had been employed by a client, named *Molyneux*, to prosecute an action in the Town Court, in which judgment had been obtained for 30*l*. Upon this judgment, *Bramwell* obtained a warrant, in the nature of a *feri facias*, directed to the serjeants at mace, and also, by *Bramwell's* express desire, to one *Nicholas Richards*, a person whom *Bramwell* was in the habit of employing occasionally to clean shoes. A seizure being made under

A person whose name is added to that of the regular officer in a warrant under a *fi. fa.*, by the plaintiff's attorney, and who is employed to watch the goods after they have been taken by the officer, is not a labourer within the jurisdiction of justices of the peace under 20 Geo. 2, c. 16.

(a) Counsel for the plaintiff, the defendant, *C. F. Williams*, and *Wilde*, Serjt., and *Halcomb*; for *Carter*.

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this warrant, *Richards* was left by *Bramwell* in possession, and he remained on the premises four days and three nights. *Bramwell* refused to pay any thing to *Richards* for his services, alleging that he had suffered part of the goods to be removed. Upon this refusal, a summons for the appearance of *Bramwell*, to answer the complaint of *Richards* before the defendant, then being mayor of Penzance, was granted by *Beard*, the town-clerk. This summons being shewn to the defendant, he objected that it was informal and improper; upon which he was told by *Beard*, that if he had thought that *Richards's* claim was one of which the defendant had cognizance, he would have prepared it in a more formal manner. On the 1st of January, 1827, the defendant issued a summons stating, that "information, &c. upon the oath of *Nicholas Richards*, labourer, of Penzance, had been made to him, defendant, that on the 24th day of December last, *Richards* was employed by *Thomas Bramwell* of Penzance, solicitor, and sent to the house of *James Jenkie*, of the same town, to take care of certain goods taken in execution, but without naming the amount of the wages; that he, *Richards*, had duly performed the service, and that *Bramwell* refused to pay him the wages justly due to him for this service; and *Bramwell* was thereby required to appear before *Penneck*, at the Guildhall, on the 2d January, to show cause why the said wages should not be paid." Upon this summons the parties attended; and the mayor proceeded to hear the complaint. *Bramwell* objected that the mayor had no jurisdiction, and also that *Richards* had earned nothing, because he had suffered the goods to be removed. It was stated, that *Richards* had acted under the execution; and the warrant lay on the table. The defendant said he had jurisdiction, and that the compensation claimed was due as wages to *Richards* for services done; but said he would take time to consider of the case. On the following day, the mayor made the following order:—"Whereas, information and complaint

have been made unto me, *Henry Penneck*, M.D., mayor, and one of his Majesty's justices of the peace of and for the said town, by *Nicholas Richards* of the said town, labourer, setting forth, that on or about the 4th day of December last past, he was hired or employed by *Thomas Bramwell*, of the said town of Penzance, gentleman, to perform certain services for him at Penzance aforesaid; that the said complainant hath duly served the said *T. B.* under that hiring, and performed the said services, for the space of five days and four nights; and that there is now justly due and owing, from the said *T. B.* to the said complainant, for his services aforesaid, the wages for such services, which the said complainant hath demanded of the said *T. B.*; but he, the said *T. B.*, hath refused, and doth refuse to pay the same. And whereas the said *T. B.* hath been duly summoned to appear before me, the said Justice, to answer the matter of the said complaint, but has not shewn any sufficient cause; I, therefore, having duly examined into the truth and matter of the said complaint, and upon due consideration had thereof, do hereby adjudge and determine, that the sum of 13s. and 6d. is now justly due and owing, from the said *T. B.* to the said complainant, as and for the wages aforesaid, and do thereupon order, that the said *T. B.*, upon due notice hereof, do pay, or cause to be paid to the said complainant, the said sum of 13s. and 6d., as and for his wages aforesaid; and the further sum of 8s. and 6d., as and for his costs and charges by him in that behalf incurred; the same to be paid within the space of six days from the date hereof.

Given under my hand and seal, the third day of January, in the year of our Lord 1827.

L. S.

HENRY PENNECK."

No attention being paid by the plaintiff to this order, after several applications to him for payment, the following warrant of distress was issued:—

"Town of } To the constables of the town, and to every
Penzance. } of them. Whereas *Nicholas Richards*, of

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Penzance, *labourer*, hath complained unto me, *Henry Penneck*, M. D., Mayor, and one of his Majesty's Justices of the Peace of and for the town, that he was employed by *Mr. Thomas Bramwell*, of the town of Penzance aforesaid, solicitor, on the fourth day of December last, and sent to the house of *Mr. James Jenkin*, in the said town, and there employed to take care of certain goods, taken in execution, where he continued for five days and four nights, and that the said *Nicholas Richards* hath duly performed the said service, and that no particular wages were specified. And whereas the said *Thomas Bramwell*, having appeared before me, in pursuance of my summons for that purpose, hath not proved to me that the wages justly due unto the said *Nicholas Richards*, for the service aforesaid, have been paid to him, the said *Nicholas Richards*, nor hath shewed any just cause why the same should not be paid, and hath not paid the same; I, therefore, the said Justice, upon due examination and consideration had thereof, on the third day of January instant, by writing under my hand and seal, did thereupon adjudge, determine, and order, that the said *T. B.*, within six days from the date of the same order, shall pay, or cause to be paid to him, the said *N. R.*, the sum of 13s. and 6d., which appeared to be justly due from him, the said *T. B.*, to him, the said *N. R.*, as and for his wages, for the service aforesaid. And whereas it appears to me, that the said *T. B.*, on the third day of January instant, had due notice of my said order, and that due demand of the said sum of 13s. and 6d. was then made of him, the said *T. B.*, but that he, the said *T. B.*, did not then pay, nor hath yet paid the same, or any part thereof: these are, therefore, to command you to make distress of the goods and chattels of him, the said *T. B.*; and if within the space of four days next after such distress by you made, the said sum of 13s. and 6d., together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of

the money arising by the sale, you do pay the said sum of 13s. and 6d. unto the said *N. R.*, returning the overplus upon demand to the said *T. B.*, the reasonable charges of taking, keeping, and selling the said distress, being thereout first deducted.

Given under my hand and seal, the twentieth day of January, 1827.

L. S. HENRY PENNECK, Mayor."

Under this warrant the plaintiff's office was entered, and his goods taken, until the 13s. 6d. was paid. Notice of action was proved, and the suit was commenced in due time (*a*). The learned Judge told the jury, that he was clearly of opinion, that the plaintiff was not liable to pay *Richards* a single shilling; that *Richards* was employed under the borough court, and for distraining the plaintiff in that action; that *Richards* was entitled to receive a compensation for his services, but that in ordinary cases it is not the attorney, but the plaintiff in the action, who is liable to pay that compensation; that *Richards's* services were not in the nature of *labour*, within the meaning of the statute (*b*); and that he was clearly of opinion

(*a*) See 24 Geo. 2, c. 44.

(*b*) 20 Geo. 2, c. 19, which enacts, that "all complaints, differences, and disputes which shall happen between masters, or mistresses, and servants, in husbandry, who shall be hired for one year, or longer, (extended by 31 Geo. 2, c. 11, s. 3, to all servants in husbandry, though hired for less time than a year), or which shall happen or arise between masters and mistresses and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other *labourers*, employed for any certain time, or in any other manner, shall be heard and determined by one or more justice, or justices of the peace of the county, riding, liberty, town

corporate, or place where such master or mistress shall inhabit, *although no rate or assessment of wages has been made that year*, by the justices of the peace of the shire, riding, or liberty, or by the mayor, bailiffs, or other head officers, where such complaints shall be made, or where such differences or disputes shall arise; which said justice, or justices, is, and are hereby empowered to examine upon oath any such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, or other labourer, or any other witness, or witnesses, touching any such complaint, difference, or dispute, and to make such order for payment of so much wages to such

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that the Mayor had no jurisdiction. Upon this a verdict was found for the plaintiff, damages 13s. 6d., with leave for the defendant to move to enter a nonsuit.

In Michaelmas Term, *C. F. Williams* moved accordingly; and cited *Lowther v. Earl of Radnor (a)*, and *Foster v. Blakelock (b)*. The Court granted a rule to show cause why a nonsuit should not be entered, or a new trial had, unless the parties consented to a special case. No such consent having been obtained,

Halcumb (with whom was *Tindal*, S. G.) now shewed cause. This rule was moved on the ground that the learned Judge misdirected the jury upon two points, viz. by telling them, first, that the defendant had no juris-

servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, or other labourer, as to such justice, or justices, shall seem just and reasonable, provided that the sum in question do not exceed 10*l*, with regard to any servant, nor 5*l*, with regard to any artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, or labourer; and in case of refusal, or non-payment, of any sums so ordered, by the space of one and twenty days next after such determination, such justice, and justices, shall and may issue forth his and their warrant to levy the same by distress and sale of the goods and chattels of such master or mistress, or person employing such artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, or other labourer, rendering the overplus to the owners, after payment of the charges of such distress and sale." sect. 1.

"That it shall and may be lawful to and for such justice, or jus-

tices, upon application or complaint made upon oath, by any master, mistress, or employer, against any such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, or labourer, touching or concerning any misdemeanour, miscarriage, or ill-behaviour, in such his or her service or employment (which oath such justice, or justices, is, and are hereby empowered to administer), to hear, examine, and determine the same, and to punish the offender by commitment to the house of correction, there to remain and be corrected, and held to hard labour for a reasonable time, not exceeding one calendar month, or otherwise by abating some part of his or her wages, or by discharging such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, or labourer, from his, her, or their service or employment," sect. 2.

(a) 8 East, 113.

(b) 8 D. & R. 48; 5 B. & C. 328.

diction; and secondly, that any claim which *Richards* might have, must be against the plaintiff in the former action. This is not a case in which a justice of the peace has any authority, under 20 Geo. 2, c. 19, extended by 81 Geo. 3, c. 11, to cases where the hiring is for less than a year; or under 4 Geo. 4, c. 34, which merely authorizes the magistrate, in cases falling within the two former statutes, to direct the payment of the wages to be made within such period as he shall think proper. The employment of *Richards* by the plaintiff, in executing the process of a court as a special bailiff, does not constitute him a labourer, within the meaning of these statutes. The kinds of labour to which the statutes were intended to apply, may be collected from the several provisions contained in them; and which give the magistrate power to punish the servant or labourer, by committing him to hard labour, for breach of his contract, and to discharge him from the service or employment, in respect of which the claim of wages has arisen. But how could the defendant have discharged *Richards* from his employment under the warrant in question? [*Bayley, J.* You would put it thus: A magistrate could not have committed the party to hard labour for a month. He could not have discharged him from the warrant.] In *Lowther v. Earl of Radnor* (a), the labour performed, was clearly of the description intended by the statutes; but there are many kinds of service to which these statutes do not apply; as for example, the services rendered by domestic servants. Upon the second point, *Foster v. Blakelock* (b) was cited, but that case is very distinguishable from the present. [*Bayley, J.* That only shews, that an attorney may so deal with an officer as to make himself liable.] Then, if the defendant had not originally jurisdiction over the subject-matter of complaint, it is quite clear that he cannot have acquired it by any act of his own; and the whole proceeding being *coram non iudice*, trespass will lie against him.

(a) 8 East, 113.

(b) 8 D. & R. 48; 5 B. & C. 328.

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C. F. Williams and Carter, contra. Richards was put into the process by the plaintiff's own nomination. In *Lowther v Earl of Radnor*, the party was a master-mason, and not a labourer. It would be a great inconvenience, if a person in the situation of *Richards*, was compelled to sue in the superior courts for such a demand as this. [*Holroyd, J.* You might sue in the county court. *Littledale, J.* We must look to the act of parliament.] The fact of *Richards's* name being in the warrant was not before the mayor. [*Bayley, J.* *Richards* states, that he told the defendant, that the sum was claimed for fees in executing the writ.] There was no evidence before the defendant, that *Richards* was named in the process. Trespass does not lie against the magistrate for any thing done in the discharge of his duty, where he is not made acquainted with all the circumstances under which he is called upon to act. *Pike v. Carter (a)*. [*Holroyd, J.* There is no allegation in the warrant, that *Richards* was employed as a labourer. The addition of labourer, does not shew that he was a labourer on the particular occasion.] It is sufficient if the employment constitutes him a labourer. [*Holroyd, J.* Convictions are *stricti juris*. The warrant should have shewn, first, that *Richards* was a person within the statute; next, that the employment was within the statute]. The whole facts were not before the magistrate. [*Bayley, J.* No question was put on cross-examination, to shew, that defendant did not know that *Richards* was named in the writ of execution. *Holroyd, J.* The magistrate should have shewn, that the case was within his jurisdiction; or at least, that the evidence presented such a case. *Bayley, J.* *Richards's* examination was read; and if the plaintiff had kept back any circumstances, tending to shew that the magistrate had no jurisdiction, the case would have been very different.] The warrant was sufficient to protect the defendant, unless it was known on the part of the plaintiff, that the defendant had no jurisdiction. The work was sufficiently described in the warrant, without

distinctly calling the party a labourer. There was not any distinct evidence at the hearing before the defendant, that *Richards's* name was in the warrant. [*Littledale, J.* If, instead of a distress, there had been a commitment, would not the plaintiff have been discharged under a habeas corpus?] It does not follow, that an action would lie. [*Holroyd, J.* The charge itself should shew, that the complainant was within the act. *Bayley, J.* A magistrate ought to be protected, where he is justified by what appears before him, however the real fact may be. *Holroyd, J.* Though you describe the party by the addition of labourer, you would not, by that allegation, be bound to prove that he was one. *Bayley, J.* If this sort of labour were within the act, an attorney's writer would be entitled to avail himself of it. *Holroyd, J.* Or a merchant's clerk.] The assessment of wages directed by the statute, could not apply to persons in that situation of life. [*Bayley, J.* We are to act upon the representation made before the magistrate. When one party represents that which the other does not contradict, the magistrate would be justified in acting upon the statement.] The only objection taken, was to the nature of the services, and not to the manner in which he was employed.

BAYLEY, J.—In this case, there is not any description of the party, or of the labour in which he was employed. This excludes the question, whether the magistrate knew that *Richards* was named in the writ, taking it, that the plaintiff concealed the fact. The statute does not give a general authority to the magistrates; but “although no rate or assessment may have been made that year by the justices.” The act refers to existing laws, for the better regulation of servants, and for the payment of wages to them, and to artificers, handicraftsmen, and labourers; and then it empowers the justices to hear disputes, although no rate may have been made that year. It seems that the employment contemplated is not every species of labour.

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The statute 5 *Eliz.* c. 4 (a), will give some idea what sort of labour was meant. It was principally out-door work and country labour. Another of the laws referred to in 20 *Geo.* 2. c. 19, is the statute, 2 *Jac.* I. c. 6. (b). The

(a) Which enacts (sect. 15), "that the justices of the peace of every shire, riding and liberty within the limits of their several commissions, or the major part of them, being then resident within the same, and the sheriff of that county if he conveniently may, and every mayor, bailiff, or other head officer within any city or town corporate wherein is any justice of peace, within the limits of the said city or town corporate, and of the said corporation, shall before the 10th day of June next coming, and afterward, shall yearly, at every general sessions first to be holden and kept after Easter, or at some convenient time within six weeks next following every of the said feasts of Easter, assemble themselves together; and they (so assembled), calling unto them such discreet and grave persons of the said county, or of the said city or town corporate as they shall think meet, and conferring together respecting the plenty or scarcity of the time, and other circumstances necessarily to be considered, shall have authority by virtue thereof, within the limits and precincts of their several commissions, to limit, rate, and appoint the wages, as well of such and so many of the said artificers, handicraftsmen, husbandmen, or any other labourer, servant, or workman, whose wages in time past have been by any law or statute rated and appointed, as also the

wages of all other labourers, artificers, workmen, or apprentices of husbandry which have not been rated, as they the same justices, mayors, or head officers, within their several commissions or liberties shall think meet by their discretions to be rated, limited, or appointed by the year, or by the day, week, month, or otherwise, with meat and drink, or without meat and drink, and what wages every workman or labourer shall take by the great, for mowing, reaping, or threshing of corn and grain, or for mowing or making of hay, or for ditching, paving, railing, or hedging, by the rod, perch, lugg, yard, pole, rope, or foot; and for any other kind of reasonable labours or service; and shall yearly before the 12th day of July next after the said assessments and rates so appointed and made, certify the same ingrossed in parchment, with the considerations and causes thereof, under their hands and seals into the Queen's most honourable court of Chancery."

(b) By which after reciting (sect. 1), the provision of 5 *Eliz.* c. 4, s. 15, and reciting (sect. 2), that the act hath not, according to the true meaning thereof, been duly put in execution; whereby the rates of wages for poor artificers, labourers, and other persons whose wages were meant to be rated by the said act, have not been rated, and proportioned according to the plenty,

reason of passing this statute was a doubt which had been entertained, whether the power of the justice extended beyond ordinary labour and work. In *Lowther v. Earl of Radnor* (a), there was no difficulty as to fixing the rate of the particular species of labour. It is expressly mentioned in the statute of *Elizabeth*. Here there was nothing to do but to take care that nothing was done by others. *Ad ea quæ sæpius occurrunt jura adaptantur* (b). There is also considerable weight in what was said by Mr. *Halcomb* as to the second clause of the statute. By that clause the magistrate has power to put the parties to hard labour for a month. This shews what description of labour the statute contemplated.

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HOLROYD, J.—I entirely concur in the view of my brother *Bayley*. If this is not correct, I do not see why the statute should not be extended to the service of a merchant's clerk, where the rate of remuneration was not settled between the parties. I think it was enough for the party summoned to say that the claim was for fees. The *onus probandi* as to the nature of the employment, lay upon the party applying to the magistrate to act. A considerable objection arises upon the form of the warrant, in not stating expressly a case within the statute.

scarcity, necessity, and respect of the time which was politically intended by the said act, by reason that ambiguity and question have risen and been made, whether the rating of all manner [of] artificers, workmen, workwomen, his and their wages, other than such as by some statute and law have been rated, or else such as did work about husbandry should or might be rated by the said law, forasmuch as the said law has been found beneficial for the commonwealth; It is enacted (by sect. 3), that the said statute, and the authority by the same statute given to

any person or persons for assessing and rating of wages, and the authority to them in the said act committed, shall be expounded and construed, and shall by force of this act give authority to all persons having any such authority to rate wages of any labourers, weavers, spinsters, and workmen or workwomen, whatsoever, either working by the day, week, month, year, or taking any work at any person or persons hand whatsoever, to be done in great, or otherwise.

(a) 8 East, 113.

(b) *Bole v. Horton*, Vaugh. 373.

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LITLEDALE, J.—This rule ought to be discharged. I do not enter into the question whether the defendant knew that *Richards* was named in the warrant, or whether the warrant against the plaintiff was sufficient. The expression “labourers employed in any other manner,” does not apply to such a case as this. The labourer must be employed in some description of work in which the justices may fix the rate. This was quite out of their province. If the property was valuable it might be necessary that he should employ other people under him. He might be entitled to one or two guineas a day.

Rule discharged (a).

(a) And see *Wilson v. Weller*, 1 Bro. & Bingh. 57; *post*.

JOHN JONES v. TANNER, executor of BENJAMIN JONES,  
deceased.

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Assumpsit does not lie for the amount of the plaintiff's distributive share of the personal estate of an intestate, admitted by the administrator, to be in his hands. *A fortiori*, it will not lie against the executor of such administrator, upon an admission made by the former.

**ASSUMPSIT.** First count, for money lent by the plaintiff to the testator. Second count, for money paid by the plaintiff to the use of the testator. Third count, for money had and received by the testator to the use of the plaintiff. Fourth count, upon an account stated between the plaintiff and the testator. In these four counts, the promises were laid as made by the testator. The fifth count was for money lent to, and paid, laid out, and expended for the use of the testator, and money had and received by the testator to the use of the plaintiff, and upon an account stated between the plaintiff and the testator, laying the promise by defendant as executor. Sixth count, on an account stated by the defendant, of money owing by him as executor. Plea—first, non-assumpsit; secondly, to the 1st, 2d, 3d, and 4th counts, a set-off for money due from the plaintiff to the testator; and thirdly, to the same counts, testator *non assumpsit infra sex annos*. At the

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trial at the last Bridgewater assizes, before *Burrough, J.*(a), it appeared, that *William Jones*, the father of the plaintiff, and of the testator, having died intestate, the testator possessed himself of his personal property, either as administrator to his father, or as executor *de son tort*. The testator died in July, 1816.(b). It was stated, that this action was brought to recover 79*l.* and upwards, in respect of moneys which the testator had held as the plaintiff's distributive share of their father's property. It appeared that after the death of the testator, the plaintiff's sister applied to the defendant for 70*l.* due to the plaintiff on her father's account. The defendant said it was the plaintiff's right, and he should be paid; and he furnished the following account:

"The net amount of Mr. *W. Jones's* effects, after deducting debts and other expenses, is as under:—

|                   |      |    |    |
|-------------------|------|----|----|
| Gross amount      | 640  | 3  | 1  |
| Deduct debts, &c. | 221  | 12 | 5½ |
|                   | £418 | 10 | 7½ |

• Net amount to be divided

|            |   |   |   |                      |
|------------|---|---|---|----------------------|
| among five | . | . | . | 5)418 10 7½          |
|            |   |   |   | 83 14 1½ each share. |

|                           |   |             |          |
|---------------------------|---|-------------|----------|
| Namely—To <i>B. Jones</i> | . | .           | 83 14 1½ |
| To <i>John Jones</i>      | . | 83 14 1½(c) |          |
| To <i>Anne Cantle</i>     | . | 83 14 1½    |          |
| To <i>Sarah Denman</i>    | . | 83 14 1½    |          |
| To <i>Jane Perry</i>      | . | 83 14 1½    |          |

£ 418 10 7½"

(a) Counsel for the plaintiff, *Wilde, Serjt. and Bayly*; for the defendant, *C. F. Williams* and *Carter*.

(b) This date is given from the learned Judge's report, upon which the judgment of the Court pro-

ceeded. The defendant having obtained a new trial upon the second point, the question upon the statute became immaterial.

(c) This sum was reduced to 73*l.* 19*s.* 10½*d.* by an admitted set-off.



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A servant of the testator's stated that the plaintiff conducted the testator's business for him; and that being together about six weeks before the testator's death, the testator said there was not work enough done, upon which the plaintiff said, "If you'll pay me the 200*l.* thee hast had of me"—to which the defendant said, "I've had thy 200*l.*, but I've maintained thee all the while." Upon this evidence, it was objected on the part of the defendant, first, that there was no sufficient admission to take the case out of the statute as to the 200*l.* (a); and, secondly, that the action could not be sustained upon the promise, and the account furnished by the defendant, inasmuch as no action would have lain against the testator in his own right, for any portion of the produce of the estate of *William Jones*, the father; and that if the testator could not have been sued in his own right, no action would lie against his executor. The learned Judge overruled both objections, giving leave to move upon the first point; but he refused to reserve the second; and the Jury found a verdict for the plaintiff, damages 290*l.*

*C. F. Williams* having obtained a rule to shew cause why a nonsuit should not be entered, or a new trial had,

*Erskine* and *Bayly* shewed cause. No leave was granted as to the 73*l.*, therefore there can be no nonsuit, as the first objection goes only to part of the damages found by the jury. If *Benjamin Jones* made such a contract as would render him personally liable, the action is maintainable against his executor. [*Bayley*, J. The promise was made by the defendant, not by *Benjamin Jones*, this acknowledgment ought only to bind himself.] *Benjamin Jones* had obtained possession of his father's goods, and this the defendant admits. [*Holroyd*, J. Does the

(a) The objection as to the date of this recognition was not taken. At the trial, it appeared that the testator made his will in 1822, and

died in 1826. The struggle was not on the date, but on the form, of the acknowledgment.

executor of an executor *de son tort*, represent the first testator? *Bayley, J.* You don't sue as representative of *William Jones*. *Littledale, J.* There is no count charging the defendant with having money. *Holroyd, J.* *Benjamin Jones* received the effects of his father, not for any particular party]. As against the defendant who makes the promise, it must be taken that *Benjamin Jones* received the money to the use of the plaintiff. In *Deeks v. Strutt (a)*, it was held, that no action at law lies for a legacy upon an implied promise from the executor. And *Grose, J.* relied upon the circumstance of there being no express promise in that case. Here, an express promise was proved. They also referred to *Gorton v. Dyson (b)*. [*Bayley, J.* There the defendant was a depositary, and did not hold as an executor. If an executor were to write to a legatee, "I will hold the money to your use, and allow you interest," he would make himself personally liable. *Littledale, J.* In a case before me in Sussex, a brother appeared to have told his brothers and sisters that he would hold the money which he had received as executor, and would pay them interest; upon which I held, that he was personally liable. *Bayley, J.* The account does not shew that the money had ever been in *Benjamin Jones's* hands]. In *Powell v. Graham (c)*, the court of Common Pleas held, that in an action against an executor, on an account stated of money due from him in his representative capacity, he was personally liable. *Deeks v. Strutt* merely decided that where there is no express promise, a promise will not be inferred. [*Bayley, J.* This inconvenience might arise. There might be a claim upon *William Jones's* estate. Would an action lie against an executor to pay a distributive share upon an express promise?] In *Atkins v. Hill (d)* it was held, that assumpsit lies upon a promise by an exe-

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(a) 5 T. R. 690.

Digest, 2d edit. 194, 356.

(b) 1 Brod. &amp; Bingh. 219; and see 3 J. B. Moore, 558; Gow's N. P. Cases, 78; Manning, N. P.

(c) 7 Taunt. 580; and see 1 J. B. Moore, 305, S. C.

(d) Cowp. 284.

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cutor to pay a legacy in consideration of assets. There an express promise was proved; and where an express promise is proved, the executor must be taken to have assets (a). [Holroyd, J. Was there any debt from *Benjamin Jones* before this account was delivered, even supposing that an express promise would support an action? Was what *Benjamin Jones* received a debt? Bayley, J. By 22 and 23 Car. 2, c. 19, no distribution is to be made before the end of the year. The remedy must be in a court where a bond can be taken as directed by the statute. The personal representative of *William Jones* is the party who ought to make distribution and take the bond]. The express promise admits that the plaintiff was entitled to receive the money, and also that the state of the assets was such, that no bond would be necessary. The title to the 73*l.* may be also maintained upon the last count of the declaration. [Bayley, J. Are there not decided cases that an action will not lie against an executor to charge him personally without a second consideration?] The defendant here must be taken to have admitted that there was nothing to settle in the Ecclesiastical Court. He admits that he has money, and that is a good moral consideration. [Bayley, J. If so, you should have sued the defendant personally. The assets of the testator ought not to be bound by such a promise]. There was a good moral consideration as against the testator; and the defendant acting for him, had a right so to promise as to bind the assets. Then as to the 200*l.* [Bayley, J. If it had been 1826, instead of 1816 (b), when the testator died, that point would have been open to you.]

BAYLEY, J.—This is one of the most singular actions I have ever known brought. An action is not to be brought here for a distributive share. It is not a common law right, but is given by statute, *sub modo*. The party

(a) *Vide Reech v. Kennegal*, 1 210 b. n.  
 Vez. sen. 126; 1 Wms. Saund. (b) *Vide ante*, 422 (a).

intituled must go into an account, and give bond. The right is against the personal representative of the original testator or intestate. You are suing at law for that which is not recoverable at law. You sue the defendant for that which did not charge his testator. The only act done by any one, is done by the defendant, and you sue him as the representative of *Benjamin Jones*. There was no consideration for the promise. The action is misconceived in both respects.

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HOLROYD, J.—An action will not lie for a distributive share.

LITLEDALE, J.—The statute shews that an action will not lie for a distributive share; nor will an action lie upon an express promise without a new consideration. Such an action was never thought of till those cases in *Cowper*.

BAYLEY, J.—A mere promise will not sustain an action (a).

*Erskine*.—There was no leave to move, as to the 73*l*. (b).

BAYLEY, J.—Then have we the power of directing a non-suit to be entered? It has a different effect as to costs.

Rule absolute for a new trial (c).

(a) As to the doctrine concerning *nudum pactum*, see *Rann v. Hughes*, 7 T. R. 350, n; 4 Bro. P. C. 2d edition, 27; *Hawkes v. Saunders*, Cowp. 289; 1 Wms. Saund. 211, n.; *Brown v. Marsh*, Gilb. Rep. 154; *Watkins's case*, Hil. 3 H. 6, fo. 36, pl. 33.

(b) *Ante*, 422.

(c) On the second trial (Taunton Spring Assizes, 1828), the 73*l*.

19*s*. 10*gd*. was not insisted on; but the plaintiff obtained a verdict upon new evidence, as to the residue of his demand. (Counsel for the plaintiff, *Wilde*, Serjt. and *Bayly*; for the defendant, *C. F. Williams* and *Manning*). In Easter Term, 1828, a rule nisi was obtained to set this verdict aside on the ground of surprise.

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The taking of a tenement at 20 guineas a year, the rent to be paid weekly, but either party, to be at liberty to give three months' notice from any quarter day, is a yearly hiring within 6 *Geo.* 4, c. 57.

THE KING *v.* THE INHABITANTS OF HERSTMONCEUX.

TWO justices, by their order, removed *James Start, Susannah* his wife, and their three children, from the parish of All Saints, in the town and port of Hastings, to the parish of Herstmonceux, both in the county of Sussex: and the Sessions, on appeal, quashed the order as to one of the children, she being illegitimate, and confirmed it as to the other paupers, subject to the opinion of this Court, upon the following case:

On the 20th December, 1827, the pauper, *James Start*, being then settled in Hertmonceux, agreed with *John Foster*, to take a house in the parish of All Saints, Hastings, at twenty guineas a year, the rent to be paid weekly, and either party to be at liberty to give three months' notice from any quarter day, and at the expiration thereof, to determine the tenancy. The pauper continued a year in the occupation of the premises, and paid a full year's rent.

*Long and Capron*, in support of the order of Sessions. The question in this case is, whether the pauper acquired a settlement in the parish of Hertsmonceux, by the renting of a tenement, pursuant to the requisites of the statute, 6 *Geo.* 4, c. 57. (a). The Sessions have decided that he

(a) Which came into operation the 22d June, 1825, and which enacts, "that no person shall acquire a settlement in any parish or township maintaining its own poor, by or by reason of settling upon, renting, or paying parochial rates for any tenement, not being his or her own property, unless such tenement shall consist of a separate and distinct dwelling-house or building, or of land, or of both, *bond fide* rented by such person,

in such parish or township, at and for the sum of 10*l.* a year, at the least, for the term of one whole year; nor unless such house or building, or land, shall be occupied under such yearly hiring, and the rent for the same, to the amount of 10*l.*, actually paid, for the term of one whole year at the least, provided always that it shall not be necessary to prove the actual value of such tenement."

did not, and it is confidently submitted that their decision is right. The act requires a *bonâ fide* renting, at 10*l.* a year; which the facts stated in this case entirely fail to shew. The tenancy created might endure for a year, but there was nothing in the agreement making it binding upon either party that it should be so. [Bayley, J. But it did endure for a year, in point of fact; and, then, is not the statute satisfied? Where there is a general hiring, at weekly wages, with an agreement for a month's warning, and a year's service is performed, that is a yearly hiring, (a). Is not that an analogous case with the present?] Such a contract would, doubtless, be considered, by construction of law, a contract for a year; but it is submitted, that the cases are very distinguishable. As the rent, here, was to be paid weekly, the statement that the house was taken "*at 20 guineas a year,*" can only mean that the house was taken *at the rate of 20 guineas a year*, that is, at so much a week as would, at the end of a year, amount to 20 guineas. There was, therefore, no yearly rent here, which the statute clearly requires. Neither was there a taking for the term of a year. Either party might have determined the tenancy at the end of six months; but the taking required by the statute is an unconditional one: one that it is not possible for the tenant to determine, before the end of a year. All the statutes upon this subject, shew the meaning of the Legislature to have been, that the party claiming a settlement by renting a tenement, shall have come into the parish, intending to be a *permanent* resident there. Thus, the preamble of the 13 and 14 Car. 2, c. 12, states, that "poor people are not restrained from going from one parish to another, and therefore do

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(a) It has been held, that a hiring for an indefinite period, at six shillings a week for the winter, and nine shillings a week for the summer, is not a yearly hiring. *Rex v. Warminster*, 9 D. & R. 70; 6 B. & C. 78; 4 D. & R. M. C.

197. There was, however, no agreement for a month's warning in that case, though the pauper once gave a month's notice of his intention to quit, which was not acted upon.

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endeavour to *settle* themselves in those parishes where there is the best stock, the largest commons or wastes to build cottages, and the most woods to burn and destroy; and when they have consumed it, *then to another parish*, and at last become rogues and vagabonds," &c.; and the subsequent statutes of 59 Geo. 3, c. 50, and 6 Geo. 4, c. 57, are in the same spirit, and lay down, both of them, one and the same rule, namely, that the tenement shall be hired for a year, at a yearly rent, and be occupied, and the rent paid, for a year also. Here that rule has not been complied with—the house was not hired for a year, nor was the rent yearly; and the fact of the house having been *occupied* for a year, and rent for a year paid, will not cure the defect in the original agreement.

*Bolland, contrâ.* It is impossible, by any operation of figures, to divide the sum of twenty guineas into aliquot parts, so as to make equal weekly payments of it (a); a fact which shews most clearly, that a *yearly*, and not a *weekly* tenancy, was contemplated by these parties. The act contains three requisites for the acquiring a settlement by renting a tenement—first, that the tenement shall be rented at 10*l.* a year, at least, for the term of a year; secondly, that it shall be occupied for a year, under such yearly hiring; and thirdly, that rent, for a year, shall be actually paid. All these have been complied with in the present case, for there is nothing in the statute requiring that the terms of the contract shall be such as to invest the tenant, from the moment of making the contract, with a perfect right to a settlement. The plain intention of these parties was to create a yearly tenancy, defeasible indeed; but which has not been defeated. The pauper was tenant of the house for a year, at the yearly rent of twenty guineas; he has occupied the house during a year

(a) 20 guineas, divided by 52, over—divided by 365, will give will give 8*s.* 0*d.*, and 36 farthings 1*s.* 1*d.* 4, and 85 farthings over.

and paid rent for a year: consequently he has satisfied all the requisites of the law, and has acquired a settlement.

*Cur. adv. vult.*

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The judgment of the Court was now delivered by

BAYLEY, J.—The pauper being settled in Herstmonceux, took a tenement in Hastings at 21*l.* a year. He clearly acquired a settlement in Hastings, provided this was a renting for a whole year, within 6 *Geo.* 4, cap. 57, which requires that the tenement be *bonâ fide* rented for the term of one year. This statute repeals 59 *Geo.* 3, cap. 50. There is nothing in the preamble of 6 *Geo.* 4, which shews that it was then in the contemplation of the legislature to require more than what would constitute a tenancy for a year. The recital in the 6th *Geo.* 4, is “Whereas the settlement of the poor has been made in some instances to depend upon the annual value of tenements which they may have rented, or upon the value of tenements, in virtue of which they have paid parochial rates. And whereas the ascertaining such value in such cases has given rise to very expensive litigation, and whereas doubts have been entertained whether an act made in the 59th year of King *George* 3, entitled “An act to amend the laws respecting the settlement of the poor, as far as regards renting tenements,” has been effectual for the purpose of altering the law in respect of the necessity of proving the annual value of tenements so rented: and it is expedient that further provision be made relative thereto.” Here we find no recital of any inconvenience having arisen where the tenancy was originally defeasible at certain periods. There is nothing in the act to shew that by the term “one whole year,” any thing more was meant than what the law considers to be a tenancy for a year. The question in this case will therefore be, whether this was a tenancy for a year; and I cannot entertain any degree of doubt but that this is *primâ facie* a



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yearly tenancy. The legal effect of this agreement was to create a tenancy from year to year, with a proviso for determining that tenancy at an earlier period. Upon principle as well as upon authority, the legal estate was vested in the pauper, subject to being defeated. In the case of all defeasible estates, the legal estate passes in the first instance. A lease for twenty-one years is frequently made determinable at the expiration of seven or fourteen years; yet it is not the less a lease for twenty one years in law, though it may be defeated by matter *ex post facto* (a). So where the lease contains a proviso for cesser of the term, upon non payment of rent, or non performance of covenants. In Co. Lit. 42 a, (b), several cases are put of defeasible life estates. Lord Coke there says, "If a man grant an estate to a woman, *dum sola fuerit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and a woman during coverture, or as long as the grantee dwell in such a house, or so long as he pay 40*l.*, &c., or until the grantee be promoted to a benefice, or for any like uncertain time; which time, as *Bracton* saith, is *tempus indeterminatum*. In all these cases, if it be of lands or

(a) So *e converso* in *Birch v. Wright*, 1 T. R. 380, Mr. J. Buller says, "if a tenant from year to year holds for four or five years, either he or his landlord, at the expiration of that time, may declare on the demise as having been made for such a number of years. So it is expressly laid down by the Court in *Legg v. Strudwick*, Salk. 414." This dictum was cited and recognized by *Gaselee, J.*, in *Lippincott, Bart. v. Yard*, Taunton Spring Assizes, 1828. The words of *Salkeld*, however, are, "*et per curiam*, it was held, first, that after the two years, the lessor or lessee might determine; but if the lessee held on, he was not then tenant *at will*, but for a year certain; for

this holding on must be taken to be an agreement to the original contract and execution of it; and the first contract was from year to year; 2ndly, the third year is not in the nature of a distinct interest, because it arises from the same executory contract, and therefore, the lessor may distrain the third year for the rent of the second; and such an executory contract as this is not void by the statute of frauds, though it be for more than three years, because there is hereby no term for above two years ever subsisting at the same time; and there can be no fraud to a purchaser, for the utmost interest that can be to bind him, can be only one year."

(b) 1 Tho. Co. Litt. 621.

tenements, the lessee hath in judgment of law an estate for life, determinable, if livery be made; and if it be of rents, advowsons, or any other thing that lies in grant, he hath a like estate for life by the delivery of the deed; and in court or pleading he shall allege the lease, and conclude, that by force thereof, he was seised, generally, for term of his life" (a).

#### Order of Sessions quashed (b).

(a) And see Preston on Estates, fore Michaelmas term, *ante* 95, 405. confirming the opinion then pronounced, by a reference to the

(b) His Lordship afterwards re-delivered the judgment of the Court, in *Rex v. Sandhurst*, which had been given at the sittings be- above decision in *Rex v. Herstmonceux*.

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#### THE KING v. THE INHABITANTS OF BRINGTON.

TWO Justices, by their order, dated 20th May, 1826, removed "*Maria Chambers*, the wife of *Edward Chambers*, then a convict at Van Diemen's Land, and their daughter, *Mary Elliott*," from the parish of Brington to the parish of Badby, both in the county of Northampton; and the sessions, on appeal, quashed the order, subject to the opinion of this court, upon the following case.

*John Elliott*, in consideration of a marriage intended between himself and *Mary Thornton*, by indentures of lease and release and settlement, of the 6th and 7th January, 1772, did grant and release a messuage in Little Brington, and about 20 acres of land, to trustees, to the uses therein mentioned, viz. to the use of himself till the marriage, remainder to himself for life, remainder to trustees to support contingent remainders, re-

ed an order of removal both as to such woman and a child who accompanied her:—Held, that they thereby virtually declared the child to be within the age of nurture, and irremovable from the mother, and that the Court might presume the fact to be so.

The wife of a person who was legally settled in A., but was a transported convict, went to B., and resided there upon an estate in which she was jointly interested with her sisters, under their mother's marriage settlement:—Held, that she was residing upon her own, and irremovable. The sessions having quashed

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mainder to the use of the said *Mary Thornton* for life, in full of jointure, remainder to trustees, their executors, &c., for 500 years from the decease of the survivor of the said *John Elliott* and *Mary Thornton*, subject to the trusts thereafter declared, and after the expiration of the said 500 years, and subject thereto, remainder to the use of the first son of the body of the said *John Elliott*, on the body of the said *Mary*, lawfully to be begotten, and the heirs of such first son lawfully issuing, remainder to the use of the second, and all and every other, the son and sons of the body of the said *John Elliott* on the body of the said *Mary*, lawfully to be begotten successively, according to seniority of age and priority of birth, and the heirs of his and their body and bodies lawfully issuing; the elder of such son and sons, and the heirs of his and their body or bodies, to be preferred; remainder to the use of all and every daughter and daughters of the said *John Elliott*, on the body of the said *Mary* lawfully to be begotten, and the heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the said daughter and daughters, if more than one, to take as tenants in common: and for want of such issue, to the use of the said *John Elliott*, his heirs and assigns for ever. The marriage took effect, and there was issue, four sons and eight daughters, all of whom died without issue, in the lifetime of their mother, except four daughters, viz. *Elizabeth*, *Alice*, *Maria*, and *Sophia*, who survived her. *Maria*, the pauper, intermarried with, and is now the wife of, *Edward Chambers*, whose legal settlement is now in the parish of Badby, where she was living until February 1826, (her husband being at that time, and continuing at the date of the order of removal, absent from England), when she went to Brington, the parish in which the property lies, to her sister, who lives in the house mentioned in the settlement, and resided there thirteen weeks, until she was removed to Badby.

*Holbeck*, in support of the order of Sessions. The only question in this case is, whether, under the circumstances stated, the pauper, *Maria Chambers*, was, or was not, by law removable. It may be assumed, for it will hardly be denied, that as one of the four surviving daughters, she had a legal estate in the house and land in Brington, under her mother's marriage settlement; and then it follows, that she was living upon her own at the time the order of removal was made, and was by law irremovable. *Rex v. Aythrop Rooding (a)* is decisive of the present case; for it was there held, that a married woman cannot be removed from the estate of her husband, as being likely to become chargeable; and that was not so strong a case as the present; for there the husband having been legally settled at White Rooding, went away and left his wife; whereupon she went and lived, without her husband, in a copyhold tenement of *her husband's own* at Aythrop Rooding: here, the husband having been legally settled at Badby, left his wife, who went and lived, without her husband, upon property of *her own* at Brington. So, in *Rex v. Marthy (b)*, it was held, that one who is resident on an estate granted to him for lives, in consideration of two guineas fine, and one shilling rent, cannot be removed therefrom, though actually chargeable. So, in *Rex v. Houghton-le-Spring (c)*, a pauper having a freehold estate in A., in the occupation of a tenant to whom he had let it, was deemed to gain a settlement by residing thereon forty days, with the licence of his tenant, for the purpose of making some repairs; such residence being considered as equivalent to a residence in any other part of the parish. This latter case is a decisive answer to any objection that may be raised to the nature and circumstances of the pauper's residence in this case. It may be admitted that she resided in the character of a visitor to her sister; but still she resided upon her own, from which she was irremovable, and that residence being for more than forty days, conferred upon her a settlement.

(a) Burr. S. C. 412. (b) 5 East, 40. (c) 1 East, 247.

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*Dwarris* and *Humfrey*, *contra*. The pauper's husband was legally settled at Badby; so, therefore, was the pauper herself. But it is said, first, that she was irremovable from Brington; and secondly, that she acquired a settlement of her own in that parish. Without admitting either of those propositions, it is to be observed, that the one does not necessarily follow from the other; the pauper might be irremovable, without gaining a settlement; for, as was said by *Davison*, J., in *Rex v. Aythrop Rooding*, (a), "*gaining a settlement, and being irremovable from a place, are not convertible terms.*" Then, here, first, it is quite clear that the pauper could not acquire a settlement in Brington, because she was a married woman; and secondly, that she was removable, because she was not, in the fair sense of the word, residing upon an estate of her own. She had no estate whatever of her own in the house and land; her interest, whatever it might have been, had passed to her husband. [*Bayley*, J. The husband and wife were both seised *in right of the wife*. That is the utmost length your argument can go. It cannot be said that the husband was seised exclusively in right of his wife (b). The wife had herself a legal interest in the premises.] The wife had no power over the estate; she had no present interest in it, but merely an interest expectant on the death of her husband: and an expectant interest will not do. In *Rex v. Eatrington* (c), it was held, that if A., residing on a cottage of his own, grant it by lease and release to B. in fee, in consideration of 36*l.*, with a proviso "that A. shall live in, and occupy the said cottage, with the appurtenances, as he has heretofore done, for life," B. takes only a remainder after an estate for life in A., and therefore has not such an interest during A.'s life, as will enable him to gain a settlement by a residence on the estate. That is an authority for saying

(a) Burr. S. C. 414.

Dougl. 314, (329); 1 Wms. Saund.

(b) *Catlin v. Milner*, 2 Lutwyche,  
 1422, 5; *Polyblank v. Hawkins*,

235, n.

(c) 4 T. R. 177.

that the pauper in this case could not acquire a settlement. Neither was she irremovable; *Rex v. North Weald Bassett* (a). There, a widow entitled to dower, which was unassigned, upon her husband's estate, which had been mortgaged by him for 1000 years, after receiving her dower upon one half year's rent from the mortgagee in possession, became chargeable to the parish in which the property was situated, before she had resided 40 days: and it was held, that as the dower had not been assigned, she had not such an interest in the parish as to render her irremovable from what could be called her own. As this pauper can never acquire a settlement at Brington, it would be a great hardship on that parish to hold her irremovable from it; because the consequence may, and probably will, be, that she will continue there, chargeable, and a burthen, for the remainder of her life. *Rex v. Aythrop Rooding*, which has been so strongly relied on by the other side, though it certainly resembles the present case in some respects, is nevertheless distinguishable from it in others. There, the pauper was not actually chargeable at the time of her removal, as she was here; and Lord Mansfield said, "she cannot be removed from her husband's property, upon being *only likely* to become chargeable." There, the Court presumed that the wife went into the removing parish with her husband's consent; for *Denison*, J., said, "this woman's going thither does not appear to be *against* the consent of her husband; it is rather to be presumed that she went *with* his consent;" here, it is impossible to presume the husband's consent, for the case finds that he had been absent from her for a considerable time before she went to Brington. There, the property belonged solely and exclusively to the husband, and in his absence there was no person but the wife who had any interest or duty to take care of it; here other persons were interested in the estate, and one of them was actually residing upon it, and taking charge of it. At all events, in order to

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(a) 4 D. & R. 276; 2 B. & C. 724; 2 D. & R. M.C., 221.

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render the party irremovable, there must be a residence, in the legal import of that word, which there was not in this case. The law requires a residence, not in the character of visitor only, which this pauper was, but in the character of owner of the estate. [Bayley, J. The pauper was interested in the property jointly with her sister, and she went to live with that sister, who resided in the very house mentioned in the marriage settlement.] But she did not go to live there in her own right; she went there merely as the visitor, and resided there merely as the guest, of her sister, without any view of enforcing her own claim to the estate. She did not even go there with the purpose of residing upon the estate; that which the law requires, and which may be termed the *animus residendi*, was wanting. The case of *Rex v. Ashton-under-Lyne* (a), is somewhat applicable upon this point. There, the pauper's husband being a soldier, deserted, and left his family in the parish of S., and the wife, during his absence, took a house at 5*l.* a year in S., and lived in it with her family, and also took another house at five guineas a year, and put some of her husband's furniture into it, intending to remove thither, but never did remove, but underlet it; and during the time she held both, her husband came to see her, and remained seven weeks concealed in the house where she lived, and was made acquainted with her having taken the two. It was held, that the husband did not acquire a settlement by that residence. And why? Upon the ground that he was in the house, not *animo residendi*, but *animo latitandi*; for the purpose of concealing himself from danger, not for the purpose of ordinary and ostensible residence. So here, the pauper was in the house, not *animo residendi*, but *animo visitandi*; merely as a guest, not as a resident. [Bayley, J. I take that case to have been decided on a very different ground. The house was taken by the wife, independently, and without the knowledge of, the husband. The landlord treated with her, and her

(a) 4 M. & S. 357.

only; he never intended to make the husband his tenant: the husband never was tenant of, or had any interest in, the house; therefore his merely inhabiting it for a particular purpose, during a particular period, conferred no settlement upon him. That I take to be the ground of the decision in that case.] If the Court are of opinion that the pauper went to Brington for the purpose of residing there in her own right, and at the same time see, as they must do, that she concealed that purpose, and went apparently with the view of merely paying a visit to her sister; then they must feel that she practised a gross fraud, to the success of which they will not by their decision contribute: *Rex v. St. Michael's, Bath* (a), where, after deciding upon other points respecting the settlement, Lord *Mansfield* said, "there is still another, and a stronger ground in this case; for the possession (of the tenement) was gained by fraud" (b). Lastly, upon the question of irremovability, it is to be observed, that the order of removal comprehends not only the wife but her daughter, and as the case does not state that the daughter was within the age of nurture, and as such irremovable from her mother, her settlement, at all events, must follow that of her father, and she was removable to Badby, the place of her father's settlement.

BAYLEY, J.—With respect to the point last made, I think the Sessions, by quashing the order of removal with respect to the child as well as the mother, have virtually, though not in express terms, declared that the child was within the age of nurture, and, therefore, not removable from her mother; therefore I see no reason for reversing the order of Sessions on that point. Then with respect to the mother, the only question really is, was she, or was she not, in point of law, removable from Brington? Whether she has acquired, or could by possibility acquire, a settlement there, is a very different question, and one which it is quite unnecessary to decide on the present

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(a) Doug. 630; Cald. 110.

(b) *Rex v. Birmingham*, post.



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occasion. Her husband is legally settled in Badby, and is still living; *primâ facie*, therefore, she was settled there, and there only, and was incapable of obtaining a settlement elsewhere. There are exceptions to that rule, but we need not consider whether the present is one of the excepted cases: it is sufficient for the purposes of this inquiry to say, whether the pauper was removable or not. I am clearly of opinion that she was not, but that she was within the principle of law, which says, that none are removable from their own estate. She had a clear legal interest in one fourth of the estate at Brington; that interest was her own, and not her husband's; the seisin was in her; it was her own property, and she had a right to go and live upon it. The argument that the husband alone was seised in right of his wife, of the interest in the estate, is not correct (a); the utmost that can be contended is, that they were seised jointly; and admitting that to be the case, it does not vary the rights of the wife. But even if the property was exclusively the husband's, still, according to the decision in *Rex v. Aythrop Rooding* (b), the wife had a natural, at least a matrimonial right, to go to her husband's estate, and being there, was not removable from it; and that is, in its circumstances, a weaker case than the present. Upon the general principle, therefore, it is clear that this pauper was not removable, if she was *residing* upon her own; but that has been denied, and it has been said that she was not *resident* in Brington, within the fair legal import of that word. I do not, however, see any thing in that objection. The pauper had a right to go and live upon the estate; she had a legal interest in it, which might naturally lead her to do so; she had a good reason for doing so, namely, to look after the rents and profits arising from the estate, as well as the desire of seeing her own sister, who was previously residing there. I am, therefore, of opinion, that she was residing upon the estate, in the fullest sense of the word, when she was removed, and that

(a) *Ante*, 434 (b).

(b) *Burr. S. C.* 412.

she was residing upon her own, and, therefore, irremovable: the result is, that the Sessions came to a right conclusion, and that their order, quashing the order of removal, must be confirmed.

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The other Judges concurred.

Order of Sessions confirmed.

The KING v. The Inhabitants of COTTINGHAM.

**T**WO justices made an order for the removal of *Ann*, the wife of *Patrick O'Hara*, and her four children, from the town and county of the town of Hull, to the township of Cottingham, as the last legal place of *her* settlement, and that of her children, in the absence of her husband; and the Sessions, on appeal, confirmed the order, subject to the opinion of this Court, upon the following case:

*Ann O'Hara's* maiden settlement was in Cottingham, the appellant parish; and she had acquired no subsequent settlement. It was admitted that the settlement of her eldest child, who was born a bastard, was also in that parish. *Patrick O'Hara*, a native of Ireland, was married to the said *Ann* on the 28th April 1819, and the three youngest children are the issue of that marriage. He has no settlement in England. Some time in the year 1819, after the marriage of the said *Ann* with the said *Patrick O'Hara*, and while they resided at Hull, the said *Ann* and her said eldest child became chargeable to Hull, and were thereupon, with the consent of her said husband, removed to Cottingham, the place of her maiden settlement: and the order of removal made upon that occasion stated the said *Ann* to be "the wife of *Patrick O'Hara*, an Irishman, who had no settlement in England;" and that the said *Patrick O'Hara* had consented to the said

The wife and children of an Irishman, who has no settlement in England, and absconds leaving them chargeable, must be removed to the place of the wife's last legal settlement, and cannot be passed to Ireland, under the 59 *Geo. 3*, c. 12, s. 33.

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removal. That order was not appealed against; and the appellants parish granted relief to the said Ann and her said child for a short time. In the early part of the year 1827, Patrick O'Hara having left Hull, and it not being known what had become of him, the wife and family again became chargeable to the respondent parish, which, as above stated, removed them to the appellants parish. Upon the trial of the appeal, it was contended on the part of the appellants, that, in consequence of the provisions of the 53 Geo. 3, c. 42, Ann O'Hara and the three youngest children, as the wife and children of an Irishman who had gained no settlement in England, could not legally be removed to the place of the mother's settlement, but should have been passed to the native country of the husband. The Court thought that they might be removed to the place of the wife's maiden settlement, and therefore confirmed the order.

*Coltman*, in support of the order of Sessions. If this woman had married an Englishman, whose settlement could not be ascertained, instead of an Irishman, and had been deserted by her husband, it is perfectly clear that she and her children might have been removed to the place of her maiden settlement. It has, undoubtedly, been decided, that the maiden settlement of a woman is suspended while she lives under the protection and control of her husband, and is maintained by him; but it has also been decided, that if the husband has no legal settlement, or none that can be ascertained, so soon as he dies or deserts the wife, her maiden parish is the place of settlement of herself and her children, and is bound to maintain them. *Rex v. Westerham* (a). *Rex v. Norton* (b); is a case somewhat at variance with this doctrine. The marginal note there states, that "the maiden settlement of a married woman is suspended, and she cannot be removed under it during the coverture;" and *Lee, C. J.*, said, "I

(a) *Foley*, 572; 2 *Bott*, 77. And lected in 4 *Burn*, 313, 4, 5 (24th ed.) see other cases to the same effect, col- (b) *Burr. S. C.* 122.

take it to be a settled point, that her settlement is suspended during the coverture, though it does not absolutely cease; and the reason is, because the contrary determination would give the justices a power of divorce. The husband is not here shewn to be dead; therefore the justices have not yet a power to send her to her own last settlement." Without inquiring into the solidity of that reasoning, it is sufficient to say, that the case was expressly overruled in the subsequent case of *Rex v. St. Botolph's* (a). There, the wife of an Irish sailor, who had no settlement in England, and who had deserted her, but who was living, was held to be removable, with her children, to her own maiden settlement. The previous decisions upon the point, and all the arguments affecting it, were fully discussed by *Ryder, C. J.*, in his judgment in that case, which he concluded by saying, "On the whole, we are all of us of opinion, that the mother's maiden settlement remains; having never been determined, but only as it were suspended during the time that she continued under the power and protection of the husband, and was maintained and supported by him." By the consent of the parties, the wife and children may be at any time removed to the maiden settlement, *Cald. 39, Rex v. Eltham* (b); and the husband's absconding and deserting his wife, is equivalent to consent on his part. The circumstance of the husband's not being an Englishman, makes no difference in the case; for the statute 69 Geo. 3, c. 12, s. 38, does not apply; and in *Rex v. Eltham*, an order removing "M. F., wife of P. F., a Scotchman, who never gained a settlement in England," and their children, to the place of her last legal settlement, which order was stated on the face of it to be made on examination of the husband, and with the consent of him and his wife, was held to be good.

*Archbold and Patteson, contra.* The maiden settlement of the pauper, she being married to an Irishman who has

(a) Burr. S. C. 367; Sayer, 198. (b) 5 East, 112.

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acquired no settlement in England, is suspended during her coverture. If her husband had continued with her, and the family had been chargeable to Hull, they might have been passed to Ireland; but as he deserted her, she and the children could neither be passed to Ireland, nor removed to her last place of settlement, but should have been relieved as casual poor by Hull, the parish in which they were resident. The doctrine laid down in the case of *Rex v. Eltham*, cannot be denied to have been law at the date of that decision; but the statute 59 Geo. 3, c. 12, has been passed since, and has entirely altered the law upon the subject. *Rex v. Leeds (a)*, is an authority in point. It was there decided, that the wife and unemancipated children of a Scotchman, who had not acquired any settlement in England, must, if chargeable, be sent by a pass with the husband to Scotland, and could not be removed to the maiden settlement of the wife; and *Abbott, C. J.*, in his judgment in that case, observed, that it was one, and that not the smallest of the evils attendant on the poor laws, as they previously existed, that cases had arisen in which it was held, that a removal, amounting to a temporary divorce, might be lawfully made: and expressed a clear opinion that the former authorities, supporting orders of removal of that nature, were no longer law. The new statute, certainly, makes the whole family removable together, so long as the husband continues with them (*b*); but, as the maiden settlement of the wife is suspended while the husband continues with her, so it must equally be suspended while he is absent from her: for otherwise, the wife and children might be removed during the shortest temporary absence of the husband, and a divorce, one of the mischiefs intended to

(a) 4 B. & A. 419.

(b) See *Rex v. Whitehaven*, 5 B. & A. 720; 1 D. & R. 384; 1 D. & R. M. C. 97, where it was said by *Abbott, C. J.*, that the meaning of the statute 59 Geo. 3, c. 12, was, that

the whole family should be removed, if the head of the family was not of ability to maintain his children, and that they were not to be removed, absolutely, without any regard to that circumstance.

be remedied, might still be the consequence. For all that appears, the absence of the husband in this case might be temporary only, and if the family had been relieved by Hull as casual poor, the husband might shortly have returned, and the whole, if they continued chargeable, might then have been passed to Ireland. That seems the only proper course to be pursued; for surely it is but reasonable that the parish which has had the benefit of a man's service, so long as he resided and maintained his family within it, should have the burthen of finding and removing him, when he has absconded and left his family chargeable.

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BAYLEY, J.—If the statute 59 *Geo. 3*, c. 12, had never passed, this would have been a case too plain for argument. Prior to the passing of that statute, if a woman married a husband who had no settlement, and was deserted by him and left chargeable, she and her children were removable to the place of her maiden settlement. In that state of the law, this woman and her children would unquestionably have been removable to Cottingham; and the question, therefore, is, whether the law in this respect has been altered by the statute since passed. The 33d section, upon which this question turns, recites, that poor persons born in Scotland and Ireland, frequently become chargeable to parishes in England, and authorizes the removal of Scotchmen and Irishmen, having no settlement in England, with their wives and families, to their own country, on becoming chargeable, either by themselves, or by their family. The object of the legislature, therefore, clearly was, to relieve parishes from the burthen of relieving casual poor born in Scotland or Ireland. It is true, that it was held in the case of *Rex v. Leeds* (a), which was decided since the statute passed, that the wife and children of a Scotchman, having become chargeable, and having no settlement in England, could not be re-

(a) 4 B. & A. 498.

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moved to the place of her maiden settlement, while her husband was residing with her, but that they and the children must be passed to Scotland. But that decision does not touch the present case. Here the husband had absconded, and the wife and children, therefore, could not be passed to Ireland. Then why might they not be removed to the place of her maiden settlement? The husband here was absent from his family, and the 59 Geo. 3, therefore does not apply. A case like the present was clearly not contemplated by the legislature, nor intended to come within the operation of the statute. The law, with respect to such cases, stands precisely as it did before. The wife and children, consequently, are clearly removable to the place of her maiden settlement; and if the husband's absence should prove temporary, no inconvenience or hardship will result from this removal: for during his absence, his family will be maintained by the parish which in justice ought to maintain them, and upon his return, or upon their finding him, which they will have an interest in doing, that parish may pass him and his family to Ireland. For these reasons, I am of opinion that the order of Sessions is right, and ought to be confirmed.

LITLEDALE, J. (a), concurred.

Order of Sessions confirmed.

(a) *Holroyd, J.*, was absent.

The KING v. The Inhabitants of the HOLY TRINITY  
 and ST. MARGARET'S, HULL.

Parol evidence of the fact of a pauper's having been tenant

TWO Justices, by their order, removed *William Thomas*, his wife, and their six children, from the parish of Ecclestone Bierlow, in the county of Stafford, to the parish of premises in the respondent parish, is admissible on the part of the appellant parish, though he held under a written agreement not produced.

the Holy Trinity and St. Margaret's, Hull, in the West Riding of the county of York ; and the Sessions, on appeal, confirmed the order, subject to the opinion of this Court upon the following case.

The respondents having proved that the pauper had acquired a settlement in the appellant parish, the counsel for the latter, upon the cross examination of the pauper, were proceeding to shew that he had in the year 1813 or 1814, acquired a subsequent settlement in a third parish, by the occupation of a tenement, and to prove what rent he paid. The respondent's counsel thereupon interposed, and asked the pauper, whether the contract under which he held the tenement was not in writing; and upon his answering that it was; they objected, that no parol evidence could be received upon the subject, but that the document itself must be produced, or the loss of it proved. The appellant's counsel in reply, contended, that they were not examining as to the contents of the document, with which they had nothing to do; that all they proposed to prove was, the fact of the occupation, and the amount of the rent of the tenement; and that they were at liberty to prove so much by the cross-examination of the pauper, without any reference to the written agreement. The Court, however, were of opinion, that the written agreement ought to be produced, or its absence accounted for, and that neither being done, the parol evidence was not admissible. The evidence, consequently, was rejected.

*Blackburn*, in support of the order of Sessions. The Sessions were right. The evidence was inadmissible. The ground of removability created by the statute 13 & 14 Car. II., c. 12, namely, the party's *coming to settle* in a parish upon a tenement of less than 10*l.* yearly value, is applicable to this case; for the evidence of the character in which the pauper held the tenement, went to the very question of settlement or no settlement, and was, in fact, the evidence which the appellants endeavoured to elicit from the pauper,

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and which the Sessions refused to hear. The meaning of the statute is, that the party comes to settle by renting or holding a tenement in the character of tenant; *Rex v. Bowness* (a), *Rex v. Glastonbury* (b); here the pauper's character of tenant was constituted by, and described in, a written agreement: consequently, the agreement itself was the only legitimate evidence of the fact that he filled that character. [*Bayley J.* The appellants did not inquire into the terms or contents of the written agreement; they simply asked a question as to the fact, whether the pauper had or had not been tenant of premises in a particular parish: surely, in reply to that question, the witness ought to have been allowed to say, "I was the tenant of A."] He could not state that he was tenant, without shewing *how* he was tenant (c); and that would have been giving parol evidence of the contents of the agreement. In *Rippiner v. Wright*, (d) where an agreement on unstamped paper had been lost, it was held, that no parol evidence could be given of its contents, even though it had been destroyed by the wrongful act of the party who took the objection; and in *Rex v. Castle Morton* (e); an unstamped agreement in writing, for the purpose of letting a tenement at a certain rent, being lost, it was held, that parol evidence of its contents was not admissible to shew the value of the tenement: the ground of those decisions being, that the contract there, was, as it is here, not a collateral matter, but of the very essence of the case. So in *Brewer v. Palmer* (f), where premises had been demised by an agreement in writing, but not on stamped paper, it was held by Lord *Eldon*, that the plaintiff was bound to give the writing in evidence; and the writing not being stamped at the trial, he nonsuited the plaintiff,

(a) 4 M. & S. 212.

(b) 1B. & A. 484.

(c) *Il est indubitable que le bail emphyteutique, le bail à cens, et le bail à rente, étant des contrats, on n'est pas reçu à les prouver par témoins, non plus que les clauses que l'on soutient en faire partie; il*

faut qu'elles soient rédigées par écrit. Danty, *Traité de la Preuve par Témoins en Matière Civile*, ch. xiv., s. 14, 3d edit. 318.

(d) 2 B. & A. 478.

(e) 3 B. & A. 588. See *Cooke v. Tanswell*, 2 J. B. Moore, 513.

(f) 3 Esp. N. P. C. 213.

and would not allow him to go for use and occupation generally. [*Bayley, J.* Because there the terms of the use and occupation must have been proved, and they would appear from the written agreement.]

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Coltman, contra. The sessions carried the rule of law too far in rejecting the evidence in question. The inquiry made of the witness, did not refer to the contents of the written agreement, but simply to a fact which was within his knowledge, independently of any writing whatever. In all the cases cited on the other side, the attempt made, was to give parol evidence of the contents of a written instrument, which was plainly inconsistent with the rule of law, that the contents of a written instrument must be proved by the production of the instrument itself. A case much more analogous to the present, is that of *Butcher v. Jarratt (a)*. There, in trover for the certificate of a ship's registry, it was held, that the certificate might be proved by the production of the registry from which it was copied, though no notice had been given to produce the certificate itself; and the distinction taken in that case, by *Chambre, J.*, applies pointedly to the present. He said, "there is an essential difference, as I conceive, between the mode of proving a very general, or a very minute description of a written instrument. The rule, undoubtedly, is, that no evidence can be received of the contents of a written instrument, but the instrument itself. But in this case the plaintiff declared in trover for a written instrument, describing it generally, and not referring to its contents, of which evidence could not have been received, as no notice had been given to the defendant to produce the instrument itself. I think, therefore, the evidence was properly admitted." *Davis v. Reynolds (b)*, is an instance illustrative of the inconvenience of holding this rule of evidence too strictly; and it was there held, that where goods consigned to *A.*, upon their arrival, were landed on the defendant's wharf, the plaintiff, in an action of trover, might

(a) 3 Bos. & Pul. 143.

(b) 1 Stark. N. P. C. 115.

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prove his title by parol, although the bill of lading which had been indorsed to him could not be received in evidence for want of a stamp. (Here the Court stopped him.)

BAYLEY, J.—The *contents* of this written agreement, undoubtedly, could not be proved by parol; and, therefore, it was properly held, in the cases which have been cited, that where such a written agreement was in existence, the terms of the tenancy, or the amount of the rent, could be proved only by the production of the agreement itself. But the rule of law does not go so far as to prevent the admission of parol evidence of the fact, that the relation of landlord and tenant existed between particular parties, at a particular time, in a particular parish. I think, decidedly, that proof by parol of the fact of the pauper's having been tenant, was receivable, and, therefore, that the sessions were wrong.

The other Judges concurred.

Order of Sessions quashed (a).

(a) And see *Rex v. St. Paul's*, 237; *Ramsbottom v. Tunbridge*, 2 *Bedford*, 6 T. R. 452; *Alves v. M. & S.* 434; 4 *Starkie on Evidence*, 81; 1 *Phillipps, Evid. part ii. chap. 9*; *Peake, Evid.*, 243, (4th edit. 275;) *Roscoe, Evid.* 5, 6; *Doe d. Wood v. Morris*, 12 *East*, *Mann. N. P. Digest*, 2d edit. 131.

The King v. The Inhabitants of RINGSTEAD.

ON appeal against an order of two Justices, for the removal of *Elizabeth* the wife of *William Saunders*, and their four children, from the parish of Kimbolton, in the county of Huntingdon, to the parish of Ringstead, in the county of Northampton, the Sessions confirmed the order, subject to the opinion of this Court, upon the following case.

A residence of forty days, previous to the passing of 6 *Geo. 4. c. 57*, upon a tenement worth more than 10*l.* a year, by a party charged to, and having paid parochial rates, will not confer a settlement, unless all the 40 days are subsequent to such payment.

The pauper's husband, who had absconded previously to the making of the order of removal, hired a tenement after Lady-day, 1825, in the appellant parish, of the annual value of 10*l.* and upwards, from Lady-day 1825, to Lady-day 1826, and went to settle upon it on the 4th of May 1825, being upwards of forty days before the passing of the 6 *Geo.* 4, c. 57, (22d of June, 1825.) A rate was made for the relief of the poor, which was allowed on the 27th of May, 1825, and paid a few days afterwards, being less than forty days before the passing of the said statute; but the requisites mentioned in the 59 *Geo.* 3, c. 50, were not complied with. On the 2d of March, 1825, a church-rate was made, at a parish meeting for the parish of Ringstead; and on the pauper's husband coming into the parish, on the said 4th of May, 1825, his name was inserted in the church-rate by the churchwardens, and the rate was afterwards paid by him. If the Court shall be of opinion that a settlement was gained by either of such ratings, or paying them, the order to be confirmed; if otherwise, the order to be quashed.

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Nolan, in support of the order of sessions. The sessions were of opinion that a settlement had been gained; and it is submitted that they were right. It was held, in *Rex v. St. Pancras (a)*, that the 35 *Geo.* 3, c. 101, s. 4, did not prevent a person from acquiring a settlement by paying public parochial taxes in respect of a tenement above the yearly value of 10*l.*, although there was no residence for a whole year, as required by the 59th *Geo.* 3, cap. 50. That case, therefore, would clearly be decisive of the present, but for the 6th *Geo.* 4, cap. 57, which was passed subsequently to that decision. That statute, it must be admitted, has abolished the settlement which might previously be acquired by the renting of a tenement above the annual value of 10*l.*, a residence of forty days upon it, and a payment of

(a) 3 D. & R. 343; 2 B. & C. 123; 2 D. & R. M. C., 28.

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parochial taxes in respect of it ; but still the question remains, whether a settlement, good in its inception by those means, could be rendered incapable of completion, by the passing of the new act in the interval between such inception and completion : in other words, whether the pauper had not done enough before the passing of the new act, to entitle him to a settlement. With respect to the poor-rate, it is clear that he was duly assessed to that rate, and paid it. He did not, indeed, reside forty days after the payment of the rate, and before the passing of the act ; but he did reside forty days ; and it seems immaterial whether the whole of the residence was subsequent to the payment of the rate or not. Section 6 of the 3d & 4th W. & M. c. 11, renders the being charged with, and paying public taxes, equivalent to the notice to the parish, required by Section 3, of that act ; and the true construction of all the statutes upon this subject seems to be, that there must be a forty days' residence after the rate is *made*, and not after it is *paid*, and that a party is settled in the parish where he has been duly rated, and has paid the rate, and has resided forty days, though some of those forty days were previous to the time of the payment. Then, with respect to the church-rate, that, undoubtedly, was made before the pauper came into the parish ; but his name was introduced into it by the churchwardens on his coming. [*Bayley, J.* It does not appear *when* the churchwardens introduced his name into the rate.] Perhaps not, distinctly ; but that seems immaterial : the only question is, whether he was duly rated. Now it is clear that he was ; for the rate was made by the churchwardens, who had authority to make it : *Watson's Complete Incumbent*, c. 39, p. 397, where the law upon that subject is thus laid down :—" Rates for reparation of churches are to be made by the churchwardens, together with the parishioners assembled, upon notice to be given in the church. And the major part of them that appear shall bind the parish ; or if none appear, the church-

wardens alone may make the rate; because they, and not the parishioners, are to be cited and punished for a defect of repairs."

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Campbell, and *Flanagan*, *contra*. No settlement was acquired by means of either of the rates. The poor-rate was made on the 27th of May; and the statute 6 Geo. 4, c. 57, came into operation on the 22d of June following; therefore, there was not forty days' residence between the making of that rate and the passing of the act; and, consequently, there was no settlement gained there. The same objection applies to the church-rate. Mr. *Nolan*, in his treatise, lays down the law upon this point clearly and correctly. He says, "It is equally necessary, that the person claiming a settlement should be an inhabitant of the parish, as that he should be rated and pay. If he reside in one parish, and is rated in another, he gains no settlement in either, under the provision of 3 W. & M. c. 11, s. 6; for that statute says, that any person who *shall inhabit* in any town or parish, and be charged with, and pay his share towards the public taxes of the said town or parish, shall thereby obtain a settlement. It seems also, that he must be an inhabitant for the space of forty days. For the rating is substituted for public notice; in which last case, as well as in all other kinds of settlings, a residence of forty days is required by 13 and 14 Car. 2, c. 12" (a). And he cites *Rex v. St. Michaels at Thorn* (b), and *Rex v. St. Nicholas, Abingdon* (c), as authorities. Then, as there must be forty days' residence after notice, and payment of the rate is notice, it follows, that there must be forty days' residence after the payment of the rate.

BAYLEY, J.—I think the pauper did not acquire any settlement in the parish of Ringstead, inasmuch as he was

(a) 2 Nolan, P. L. 115, 3d edit.

(c) Skinner, 620.

(b) 6 T. R. 536.

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not resident there forty days after he was rated, and before the passing of the new law. Previously to the statute of 3 W. & M. c. 11, it was requisite that notice should be given to the parish, and that the party should reside in the parish forty days after delivery of such notice. Then that statute dispensed with actual notice, and substituted the being charged with, and paying public rates; upon which it has been always held, that the being charged with and paying rates, will not of themselves confer a settlement, but there must be a forty days' residence. Then, if, while notice was necessary, a residence of forty days after the delivery of the notice was necessary also; it does follow, now that the being charged with and paying rates, is substituted for notice, and a forty days' residence still required, that such residence must be after the charge and payment of the rate. Here there was no such residence in either instance, and therefore, no settlement was gained. The order of sessions, therefore, must be quashed.

The other Judges concurred.

Order of Sessions quashed.

The KING v. The Inhabitants of WHITNASH.

A contract of hiring and service for a year, made between a farmer and a labourer, on a Sunday, is not within the prohibition in 29 Car. 2, c. 7, s. 1; and due service under it confers a settlement.

TWO Justices, by their order, removed *John Edgington*, *Mary* his wife, and their two children, from the parish of Radford Semele, to the parish of Whitnash, both in the county of Warwick; and the Sessions, on appeal, confirmed the order, subject to the opinion of this Court upon the following case.

The pauper, who was legally settled by parentage in the respondent parish, was offered by his father to a Mr. Cook, of the appellant parish, on Sunday, the 12th of October, 1817, as waggoner's boy, and was hired by Mr. Cook, on that day, for a year. The pauper went into Mr. Cook's

service on Tuesday the 14th, and served him under the above mentioned hiring, in the appellant parish, until the 12th of October, in the following year. Mr. Cook was a farmer, living in the appellant parish, and has been dead about twelve months. The pauper worked for different persons in the respondent parish, as a labourer in husbandry, both before and after the hiring in question.

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Amos and Hill, in support of the order of sessions. The only question intended to be discussed in this case, is, whether the contract of hiring set forth, having been made on a Sunday, is or is not, valid and binding in law. On the part of the respondents, it is confidently submitted that it is. The statute 29 Car. II., c. 7, s. 1, which must be relied on by the other side, enacts "that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work, of their ordinary calling, upon the Lord's day, and that any person being of the age of fourteen years or upwards, offending in the premises, shall, for every such offence, forfeit five shillings." Now that enactment does not apply to the present case, either as regards the contract itself, or the contracting party. The making such a contract, was not doing or exercising any worldly labour, business, or work, of the pauper's ordinary calling, within either the letter or the spirit of the act of parliament; the contract, therefore, is not void; and the pauper, being a boy at the time of the transaction, must be presumed, in the absence of proof to the contrary, to have been under the age of fourteen; he is, therefore, not within the reach of the penalty.

Goulburn and Pennington, *contrâ*. The penalty imposed upon offenders against this act, has nothing to do with the present case; the only question is, whether the pauper was, or was not, *lawfully* hired. The 3 W. & M. c. 11, s. 7, enacts, "that if any unmarried person, not having child or children, shall be *lawfully* hired into any

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parish or town for one year, such service shall be adjudged and deemed a good settlement therein;" the 29 Car. 2, c. 7, s. 1, enacts, "that no labourer shall do or exercise any worldly labour, business, or work, of his ordinary calling, on the Lord's day:" the argument is, that the pauper was a labourer, exercising labour of his ordinary calling on the Lord's day, when he entered into the contract, and, consequently, that he was not lawfully hired. The statute of Charles, has recently been decided to apply to private as well as public conduct and transactions; *Fennell v. Ridler* (a); therefore the fact of this contract having been made in private, will not assist the case on the other side. That the pauper was exercising his ordinary calling upon the occasion is clear, inasmuch as he was doing an act without which he could not exercise his ordinary calling, namely, hiring himself to a service; and the making a contract of hiring and service between a farmer and a labourer, must according to common understanding, be deemed a work within the ordinary calling of both those parties. But the statute is not confined to works strictly within the parties' ordinary calling; *Smith v. Sparrow* (b), where it was held that an action would not lie on a contract entered into on a Sunday, though entered into by an agent, and although the objection was taken by the party at whose request the contract was entered into; and where it was expressly stated by *Best*, C. J., and *Park*, J., that the statute ought to receive such an extended and liberal construction, as will best promote its object, the advancement of piety and religion. The pauper in this case was actually contracting for the sale of his labour for a year. What real difference is there between a contract for the sale of labour, and a contract for the sale of goods? Yet the latter, if made on a Sunday, would confessedly be void. [*Bayley*, J. If a barrister, or a judge, were to hire a servant on a Sunday, without whom he could not carry on his ordinary calling, would not the contract be binding? Or, if a

(a) 8 D. & R. 204; 5 B. & C. 406.

(b) 4 Bingh. 84.

farmer, wanting reapers, should see Irish labourers passing through his village on a Sunday, may he not stop them and hire them? Must he lose his chance of obtaining reapers? The words of the act are general, and comprehend every person exercising any worldly labour. The words *worldly labour* ought to be read disjunctively from the rest of the sentence; and the act ought to be so construed as to give it the most general and extensive operation possible.

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BAYLEY, J.—I agree that this act of parliament ought to receive such a construction as is consonant with the object which the legislature had in view in passing it, and calculated to promote the attainment of that object; but I do not agree that it should be construed in so unlimited a mode, as to render every description of work on a Sunday, illegal. It enumerates certain persons to whom it is intended to apply, namely, tradesmen, artificers, workmen, and labourers. If the prohibition was intended to embrace all descriptions of persons, and every species of business, why was this enumeration of particular classes of persons adopted, when the simple expression, “no person whatsoever,” would so clearly and unequivocally have explained the meaning? I cannot help thinking, that if the provision had been intended to be general, the language in which it was framed, would have been general also. But, it has been urged that the words, “worldly labour” in the act, ought to be read disjunctively from the rest of the sentence in which they are found; and that, being so read, they will have reference to cases where the contract has been made by parties not exercising their ordinary calling. I cannot adopt that construction of the act; I think the act was meant to apply only to cases where one, or both, of the contracting parties was acting in his ordinary calling, or *business*, as it may be more properly termed. I cannot bring my mind to the conclusion, that the exercise of every descrip-

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tion of business was intended to be prohibited. The real interests of religion do not require such strictness. It is not necessary that every hour of every Sunday should be dedicated to acts of devotion. I can conceive that a man may act very laudably in making a bargain like this on a Sunday, without at all interfering with his religious duties. I think a man, by so doing, may materially add to the comforts, and diminish the labours of his servants, and in so doing be in the performance of a duty, instead of a crime. If so, there can be nothing militating against the interests of religion, or, consequently, against the object for the furtherance of which this statute was passed, in the transaction between the pauper and his master. I am, therefore, of opinion, that the act of hiring a servant by a master, or of contracting for a service by a labourer, on a Sunday, is not an offence within the letter or spirit of this act of parliament, and consequently that the pauper, having served his due time, under a legal hiring, has acquired a settlement. Surely it would be absurd to say that such an act, which can be performed only once in the course of a year, is a part of the ordinary calling of either the master or the servant.

HOLROYD, J.—I think the hiring in this case was a lawful hiring, and that due service under it conferred a settlement on the pauper. The object of the statute was to prohibit persons from carrying on their ordinary business and calling on the sabbath. It is a penal act, and, therefore, is not to be construed so as to give it an operation extending beyond the clear and necessary import of its words. Construing it according to that rule, it seems to me that the business, or work, or labour of persons, performing it in the course of their ordinary calling, was all that was intended to be prohibited; and that the contract entered into between these parties, does not come within that prohibition. If the servant had gone to plough, or the master had made a sale of corn, upon the

Sunday, each would have been exercising his ordinary calling, and would have come within the purview of the statute; but the one hiring a servant, and the other letting himself to a service, does not appear to me to come within that description, or to be an offence against the provisions of the act. I am, therefore, of opinion, that the pauper was lawfully hired.

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LITLEDALE, J.—I am clearly of opinion that there was a lawful hiring in this case. I have no doubt that the words “ordinary calling,” in the act, were meant to extend to all the preceding words in the sentence, and ought to be read in connection with the words, “worldly labour.” I think this is evident from the context. Tradesmen, artificers, workmen, and labourers, are specifically named, and the other persons mentioned, must be taken to be other persons, *ejusdem generis*. If so, the act cannot extend to a case like the present. Nor ought it. Such an act, penal in its consequences, ought not to be so construed as to have an operation beyond its fair meaning. The act of hiring on the one side, or of letting on the other, was not, in my opinion, an exercise of the ordinary calling of either of the parties, in the fair sense of those words; nor was there any work, business, or labour, in it.

Order of Sessions confirmed (a).

(a) See *Res v. Brotherton*, 2 Stra. 702; *Drury v. Defontaine*, 1 Taunt. 135; *Blossome v. Williams*, 5 D. & R. 82; 3 B. & C. 232; *Sandiman v. Bridge*, K. B. Trinity term, 1827. That was an action against a stage coach proprietor, to recover the expences incurred by the plaintiff in consequence of the defendant neglecting to convey him from Clapton to

London, on a Sunday evening, the plaintiff having booked a place and paid a shilling earnest at the defendant's booking office. The defence set up was, that the contract being made on a Sunday, was void by the statutes 3 Car. 1, c. 1, and 29 Car. 2, c. 7, and therefore that the action was not maintainable. The plaintiff had a verdict, and a rule for entering a

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nonsuit was afterwards granted, after hearing which argued, the whole Court were of opinion that stage coach proprietors were not

within the scope of either of those statutes, and that the action was maintainable. Ed. MSS."

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Where an apprentice is bound out of a parish by his father, but part of the expenses is paid out of the parochial funds, the indenture must be approved by two justices, "under their hands and seals," pursuant to 56 Geo. 3, c. 139, s. 11, or it will be void *ab initio*, and service under it will confer no settlement.

JANE COLEMAN was removed by an order of two justices from the parish of Stoke Damarel, to the parish of Charles, in the borough of Plymouth, both in the county of Devon; and upon appeal, the sessions quashed the order, subject to the opinion of this Court upon the following case.

The pauper, *Jane Coleman*, daughter of *Thomas Coleman*, of the parish of Stoke Damarel, was bound apprentice on the 16th October, 1823, to *Jeremiah Ellis*, of the parish of Charles, in the borough of Plymouth. The indenture which was on a one pound stamp, was executed by the master, the pauper, and her father, and the following allowance was written on the margin:—"Devon, to wit. We, whose names are underwritten, justices of the peace for the county aforesaid, whereof one is of the quorum, do consent to and allow the putting forth *Jane Coleman* an apprentice, according to the intent and meaning of this indenture." This allowance was signed by *E. Lockyer* and *S. Pym*, two justices of the peace for the county of Devon, but was not under seal. Upon the binding of the said *Jane Coleman* by the said indenture, an expense was incurred by the public parochial funds of the said parish of Stoke Damarel, that is to say, nine pounds, being the consideration-money mentioned in the said indenture, and a further sum, being the costs and charges attending the binding. No notice was given to the overseers of the poor of the parish of Charles, or the guardians of the poor of Plymouth, or to any of them, of the intention to bind out such apprentice, previously to the binding. Plymouth is a

borough situate in the county of Devon, having justices who have exclusive jurisdiction therein. The pauper resided in service under the indenture with the said *Jeremiah Ellis*, from the date of the said indenture until she was discharged from further service under it on the 3d July, 1826, by two magistrates (a).

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Nolan and *Praed*, in support of the order of sessions. The question in this case will depend upon the construction to be given to certain sections of the statute 56 Geo. 3, c. 139, namely, the first, second, fifth, and eleventh (b).

(a) The following were added to the special case, as the points for argument. "The counsel in support of the order of sessions will contend that the circumstances stated, bring this case either within the provisions of the second, and fifth sections of the 56 Geo. 3, c. 139, or within those of the 11th section of that act. That on the first supposition, no settlement has been gained in the parish of Charles, because no notice was given to the overseers of that parish previous to the binding: and on the second, because the justices' approval of the indenture was signed only, and not sealed by them." "The counsel against the order of sessions will contend that the circumstances stated in the case do not bring it within the provisions of the first, second, or fifth section of the 56 Geo. 3, c. 139, or within the provisions of the 11th section of that act; but that if it falls within the last section, the provisions of that section are only directory, at least so far as relates to the requisition of a settlement."

(b) Sect. 1, provides that "before any child shall be bound appren-

tice by the overseers of the poor of any parish, &c., such child shall be carried before two justices of the county, &c., wherein such parish, &c., shall be situate; who shall inquire into the propriety of binding such child apprentice to the person to whom it shall be proposed by such overseers to bind such child, &c.; and if such justices shall upon such examination and inquiry, think it proper that such child should be bound apprentice to such person, such justices shall make an order declaring that such person is a fit person to whom such child may be properly bound as apprentice; and shall therefore order that the overseers of the place to which such child shall belong, shall be at liberty to bind such child apprentice accordingly; which order shall be delivered to such overseers as the warrant for binding such child apprentice as aforesaid; and such order shall be referred to by the date thereof, and the names of the said justices in the indenture of apprenticeship of such child; and after such order shall have been made, such justices shall sign their allowance of such indenture of ap-

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If there was a valid binding of the pauper as an apprentice, either by the parties themselves, independently of that statute, or by the parish officers pursuant to its provisions, a settlement has been gained; but it is submitted, that there was *no* valid binding, and therefore that the sessions have done right in quashing the order of removal. It will probably be contended, and perhaps may be admitted, that, but for the enactments of the 56 Geo. 3, c. 139, the binding in this case would be valid, as the act of the parties themselves; *Rex v. Arundel* (a), where it was held that an infant may bind himself an apprentice by indenture, because it is for his benefit (b); and that though he is a pauper in the parish workhouse at the time of the binding, and the parish officers pay the premium, still, it is not necessary for them to sign the indenture, or that the parties should assent thereto, if the infant is not a parish apprentice within the meaning of the 43 Eliz. c. 2. [*Bayley, J.* Does not the 56 Geo. 3, c. 139, apply exclusively to parish bindings? If it does, your admission concludes you].

prenticeship before the same shall be executed by any of the other parties thereto, &c."

Section 2, after regulating the allowance of the indenture in cases where the master and the apprentice reside in different counties or jurisdictions, provides that "*notice shall be given to the overseers of the poor of the parish or place in which such child shall be intended to serve an apprenticeship, before any justice for the county or district, within which such parish or place shall be, shall allow such indenture; and such notice shall be proved, before such justice shall sign such indenture, unless one of such overseers shall attend such justice, and admit such notice.*"

Section 5, provides, that "*no settlement shall be gained by any*

child, who shall be bound by the officers of the parish, &c., *by reason of such apprenticeship*, unless such order shall be made, and such allowances of such indenture of apprenticeship shall be *signed, as hereinbefore directed.*"

Section 11, provides, that "*no indenture of apprenticeship, by reason of which any expense whatever shall at any time be incurred by the public parochial funds, shall be valid and effectual, unless approved of by two justices, under their hands and seals, according to the provisions of the 43 Eliz. (entitled, an act for the relief of the poor), and of this act.*"

(a) 5 M. & S. 267.

(b) See *Rex v. Wigston*, 5 D. & R. 339; 3 B. & C. 486; 2 D. & R. M. C., 445.

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Some parts of the act do apply exclusively to parish bindings ; but the eleventh section is more general : that applies to all bindings where any expense is incurred by the parish, and is to be read as connected with, and referring to, the preceding sections. *Rex v. Bawburgh (a)*. Then, if the provisions of this statute are applicable, generally, to all bindings where expense is incurred by the parochial funds, whether made by the parish officers or by the parties, this indenture is clearly void ; and it seems reasonable to give the statute that general application ; for the object of the legislature in passing it manifestly was, to enforce the same investigation and allowance by the magistrates, the same notice to the parish officers, and the observance of the same formalities in all respects, in bindings by private parties where the parochial funds incurred expense, as in parish bindings. In this point of view there are two fatal defects in this indenture. First, no previous notice of the binding was given to the overseers of the parish of Charles. The pauper belonged to the parish of Stoke Damarel ; the master belonged to the parish of Charles, within the borough of Plymouth, the justices of which have an exclusive jurisdiction : therefore, notice to the officers of the latter parish of the intended binding was necessary, by the express provisions of the second section of the act (*b*). That was expressly decided in *Rex v. Newark (c)*. There, the overseers of a *county* parish, in pursuance of an order of *county* magistrates, bound a pauper apprentice to a master residing in a *borough* within the same county, having magistrates with exclusive jurisdiction, and gave no notice of the binding to the overseers of the *borough* parish ; and it was held that the indenture was void under the statute. Secondly, the allowance of the indenture here was only *signed* by the magistrates, whereas it ought to have been under their hands *and seals*. It will be contended on the

(a) 3 D. & R. 338 ; 2 B. & C. 222 ; 3 D. & R. M. C., 23. (c) 4 D. & R. 745 ; 3 B. & C. 59 ; 2 D. & R. M. C., 366.

(b) *Ante*, 460.

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other side, that the act of Parliament is, in this respect, merely directory, and that as the clause requiring the approval of two justices, under their hands and seals (*a*), refers to the 43 *Eliz.* c. 2, which does not require the allowance to be under seal; it could not have been intended to make that an indispensable requisite under this act. The argument, however, cannot be sustained; for this is the case of the execution of a power given to particular persons, but binding and operating on other parties, and which must, therefore, be executed strictly and literally as given; and the magistrates have no discretionary right to dispense with any one of the formalities which they are directed to observe. This distinction between the execution of deeds which bind the parties only, and of those which operate upon third persons, was clearly laid down by Lord *Ellenborough* in his very learned judgment in the case of *Rex, v. Austrey* (*b*), and is quite decisive of the point in the present case. There, a certificate was signed by two churchwardens and one overseer, but had only two seals; and it was held to be not properly executed within the 8 & 9 *W. 3*, c. 30, which requires certificates to be under the hands and seals of the churchwardens and overseers, or the major part of them. The language of Lord *Ellenborough* upon the point was this:—"In considering how far the cases of deeds are applicable to the present, it is to be recollected, that in those cases the parties alone, under whose authority the deeds were executed, are bound by them. But the present is the case of the execution of a power, which binds and operates upon other persons at their peril, and subjects them to indictments as for crimes, in case of their disobedience to the power, if it be duly executed. In the execution of powers, all the circumstances required by the creators of the power (however unessential and otherwise unimportant) must be observed, and can only be

(*a*) Sect. 11; *ante*, 460.

(*b*) 1 Phil. Ev. 469, 5th edit. And see Sugden on Powers, 215.

satisfied by a strictly literal and precise performance (a). It is also a general principle of law, wherever a power is given to particular persons to do a written act in a particular manner, or under certain peculiar circumstances, whether it be to parish officers or magistrates, (as, to grant certificates, under which, if duly executed, other persons, especially public officers, are bound to act, or to grant warrants, or make orders), that their authority must appear upon the instrument itself. It must thereby appear, that they are the persons authorized, and that the certificate, warrant, or order, was made in the manner and under the circumstances required; otherwise, the certificate, warrant, or order, is not obligatory, but void. The statute is to be construed, in a case like this, according to common parlance and understanding, and so as to be a security to persons, who are bound to obey the powers given by it at their peril; and it is not to be construed according to what may be brought within its words by nice legal reasoning, applicable merely to deeds."

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Bolland and Coleridge, contra. The indenture in this case cannot possibly be considered as falling within the provisions of the first, second, and fifth sections of the act of Parliament; and the eleventh section is a separate and independent enactment, which ought not to be read with reference to, or in connexion with, the preceding clauses. The first ten sections are confined entirely to parish bindings; but here the binding was the act of the father, and the indenture is affected by the eleventh section only. *Rex v. Arundel (b)*, is decisive to show that none but a binding by the parish officers, is a parish binding within the meaning of the acts of Parliament; and that the mere circumstance of the premiums being paid by the parish, does not vary the case. *Rex v. Bambergh (c)*, and *Rex*

(a) See *Hawkins v. Kemp*, 3 East, 440.

(c) 3 D. & R. 338; 2 B. & C. 222; 2 D. & R. M. C., 23.

(b) 5 M. & S. 257.

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v. *Newark* (a), therefore, are no authorities for the present case, because they differ from it in this essential particular, that there the pauper was bound out by the parish officers, and here she was bound out by her father. Then with respect to the construction of the eleventh section, to which single point the question now before the Court is reduced, it is clearly unconnected with all that precedes it in the statutes; it appears to have been added after the rest of the act had been drawn; and it is evidently framed merely for the purpose of preventing clandestine appropriations of the parish funds. It is, in effect, a statute of itself, introduced by a regular preamble, the language of which plainly indicates that the enactment which follows is meant to be distinct and independent, and that the section itself is to stand alone, as if it were a separate act of Parliament (b). It does, undoubtedly, require the approval of the indenture by two justices "under their hands *and seals*," but it is evident that the latter words were not intended to be inserted, but have crept in through mistake; because it goes on to say, "according to the provisions of the said act, and of this act:" and neither *the said act*, the 43 *Eliz.* c. 2, nor the preceding sections of *this act*, require the allowance of the indenture to be under seal. All, therefore, that was meant to be required by this section, was an allowance according to the provisions of the 43 *Eliz.* c. 2, and the previous sections of the 56 *Geo.* 3, c. 139, namely, an allowance *signed* by two justices; and as there has been such an allowance in this case, it follows that the indenture is valid. But, admitting that this indenture may be *voidable* as between the parties, it by no means follows that it is absolutely *void* in law, so as to deprive the party who has served under it of a settlement. The eleventh section does not appear to have been intended in any manner to affect the settlement, for its language is, that "no inden-

(a) 4 D. & R. 745; 3 B. & C. 59, (b) *Post*, 466.

2 D. & R. M. C., 366.

ture shall be valid and effectual;" and in preceding sections, where it was intended to affect the settlement, the language is express and unequivocal, that no settlement shall be gained. It is declared by the 5 *Eliz.* c. 4, s. 26, that the binding in such cases as are within that act, shall be for *seven* years, and by sect. 41, that all indentures, otherwise thereafter to be made, than is by that statute appointed, "shall be clearly void in the law, to all intents and purposes;" language infinitely stronger than that of the 56 *Geo.* 3, c. 139, s. 11, namely, that "no indenture shall be valid and effectual;" and yet it was held, in *St. Nicholas v. St. Peter in Ipswich* (a), that that clause did not render an indenture of apprenticeship for *four* years void, but only voidable if the parties thought fit to take advantage of it, and that a settlement was gained by service under it: and the authority of that decision was admitted in argument, and recognized by Lord *Ellenborough* in *Gray v. Cookson* (b), and afterwards confirmed by the court of Common Pleas in *Gye v. Felton* (c). In the latter case, the true distinction was declared by *Mansfield*, C. J., to be, that where there is a penalty imposed, the instrument is void, because there the contract itself is illegal; but that where no penalty is imposed, the instrument is only voidable. That distinction applies to the present case; for the statute inflicts no penalty for omitting to seal the allowance, though for some other omissions it does inflict penalties; and then, the result is, that even though this indenture is voidable, still it is not void, and not having been avoided by the parties, service under it has conferred a settlement. With respect to the objection of the want of notice on the part of the parish of Charles, there is really no weight in that, for the notice is required only in cases where the service is to be performed in a different county or district from that in which the

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(a) Burr. S. C. 91; 2 Stra. *Evered*, Cald. 26; 16 East, 27.
1066. See *Rex v. Gainsborough*, (b) 16 East, 13.
1 Bott, 546, Pl. 745; *Rex v.* (c) 4 Taunt. 876.

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binding parish is situated, and where there must be a second allowance of the indenture by two magistrates of that different county or district; which is not the case here.

BAYLEY, J.—I do not know how to get over the words of this clause of the act of Parliament; they are plain and unequivocal: and I shrink from adopting a rule of construction with respect to them, which would have the effect of deciding that the legislature did not mean that which they have expressed. The statute is a recent one, and it requires certain things to be performed with regard to apprenticeships, which previous to its passing were unnecessary. The earlier clauses apply to parish bindings; but then comes the eleventh section, in these words:—“And whereas, the salutary provisions enacted by an act passed in the forty-third year of the reign of her majesty Queen *Elizabeth*, intituled, ‘an Act for the Relief of the Poor,’ are frequently evaded in the binding out of poor children, and the premium of apprenticeship, or a part thereof, is clandestinely provided by parish officers, who are thus enabled to bind out such poor children, without the sanction of justices of peace: be it further enacted, that after the said first day of October, no indenture of apprenticeship, by reason of which any expense whatever shall at any time be incurred by the public parochial funds, shall be valid and effectual, unless approved of by two justices of the peace, under their hands and seals, according to the provisions of the said act, and of this act.” It begins, therefore, with a recital of an inconvenience, which it is intended to remedy, and it then proceeds with a new enactment, which is to furnish the remedy. Looking at the whole of the clause together, it clearly relates to a subject to which the preceding sections did not apply, and was intended to make provision for other bindings, than those to which the parish officers are parties. It mentions indentures by reason of which

expense is incurred by the parochial funds; and so far the indenture in question comes within its operation, because the premium was paid by the parish officers. It requires the indenture to be approved by two justices, *under their hands and seals*. The former sections do not require the allowance of the justices to be under seal; but here the word *seals* is added. Why should that addition be made, unless it was intended that the regulation thereby enjoined should be enforced? It is said that signing is enough; but how can we reject the words which require the allowance to be sealed? *Reddendo singula singulis*, and following the ordinary legal rules of construction; it seems to me that the legislature intended by this section to require, that in indentures of apprenticeship of this sort, there should be such an approval as was necessary in cases of parish binding, *and something more*, namely, that the seals of the magistrates should be affixed to their approval. Why such an additional formality should be required, it is impossible for us to know, and would be idle to inquire; but it is required: and we must suppose that in requiring it, the legislature meant that which they have expressed. Then it is said, that even if the sealing was intended to be required, yet the omission will not render the indenture absolutely void, but only voidable; in other words, that the indenture may be valid for some purposes, and not for others. I think the words "valid and effectual" were intended to apply to the indenture *ab initio*, and that it was the object of the legislature to make it binding *ab initio*, so that the parties should not be able to avoid it. The adoption of any argument to the contrary would be highly dangerous, for the parties would then be wholly at the mercy of each other, during the whole of the apprenticeship, and either might leave the other unjustly, shortly before the completion of a period of seven years. For these reasons, I am of opinion that this indenture was void, for want of an

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allowance by the magistrates under seal, and that no settlement was acquired by service under it.

HOLROYD, J.—I concur in the opinion that this indenture was void, under the eleventh section of the act of Parliament. This was not a parish binding; but still it was such a binding as falls within the provisions of that clause. We cannot but presume, that the regulation respecting the seals was added intentionally. I do not consider, that an enactment, that indentures not approved by two justices, under their hands and seals, shall not be valid and effectual, ought to receive a qualified construction. I take the approval required, to be one conformable with former provisions, with the addition of the magistrates' seals; and where the seals are not affixed, I am of opinion that the indenture is not voidable only, but void to all intents and purposes.

LITLEDALE, J.—I think the pauper has acquired no settlement in this case. The act is perfectly plain in its language, and I cannot conceive upon what principle we can be asked to reject the words "and seals" as surplusage. It has been argued, that with respect to the requisition of the seals the act is directory only; but if that argument is good, it will equally justify the magistrates in dispensing with their signatures as well as their seals; and thus a parol approval would be sufficient, which would open a wide door to fraud. It has also been argued, that the indenture may be valid for some purposes, and not for others; but that would be a dangerous mode of construction: and why should it be valid for the purposes of gaining a settlement, and invalid for other purposes? The earlier sections of the act may be affirmative and directory, but this is clearly negative and imperative.

Order of Sessions confirmed.

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TWO Justices, by their order, removed *William Hardy* the younger, and *Mary* his wife, from the township of Bishop-Burton to the township of Cottingham, both in the East Riding of the county of York; and the sessions, on appeal, confirmed the order, subject to the opinion of this Court upon the following case:—

The pauper, *William Hardy* the younger, had acquired no settlement in his own right, but followed that of *William Hardy* his father; and the only question at the sessions was, whether Cottingham or Bishop-Burton was the last place of settlement of *William Hardy* the father. It was admitted that *William Hardy* the father, had acquired a settlement in Cottingham, the appellant parish; but the appellants insisted, that he had afterwards acquired a settlement in the respondent parish, by the purchase of a cottage situate in that parish, and a residence in such cottage for more than forty days, under the following circumstances:—In the year 1813, *Hardy* the father, agreed with one *Edward Page*, who then resided at Feversham, in Kent, for the purchase of a copyhold cottage, situate at Bishop-Burton. It was agreed that *Hardy* should pay 22*l.*, and all the expenses attending the sale. Upon these terms the purchase was made. On the 22d of July, 1813, the cottage was surrendered to *Hardy* the father; in the year 1814 he was duly admitted, according to the custom of the manor: and he has ever since continued to reside in the cottage. The amount paid by *Hardy* the father, was 22*l.* to the vendor; 3*l.* 10*s.*, the fine, to the lord of the manor; 1*l.* 13*s.* to the steward of the manor, for his admission copy; and 6*l.* 12*s.* 6*d.* to his, *Hardy's*, attorney, for the expenses of the surrender; making a total of 33*l.* 15*s.* 6*d.*

The expenses of the surrender of a copyhold estate, paid by the purchaser to his attorney, are not part of the consideration, so as to bring the purchase within the 9 Geo. I. c. 7, s. 5, and entitle the purchaser to a settlement.

Archbold, in support of the order of sessions. The

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question is, whether this was a purchase of an estate, the consideration for which amounted to the sum of 30*l.*, *bonâ fide* paid, within the meaning of the statute 9 *Geo.* 1, c. 7, s. 5 (a). It is confidently submitted that it was not. "A consideration of 30*l.*, *bonâ fide* paid," must mean 30*l.* paid to the vendor, and actually finding its way into his pocket; here the sum paid to the vendor was only 22*l.* Here the Court stopped him, and called upon

Coltman and *Patteson*, *contrâ*. This was a purchase of an estate, the consideration for which amounted to 30*l.*, and was *bonâ fide* paid, within the fair meaning of the statute. The statute does not say that the 30*l.* shall be paid to the vendor, or shall find its way into his pocket; it only requires that sum to be paid by the purchaser. Mr. *Nolan*, in his treatise (b), speaking on this subject, says, "it is sufficient if a consideration of 30*l.* is paid by the purchaser, without reference to the subsequent distribution of the purchase money. A copyhold tenement, the price of which, with the fines and fees paid to the Court, amounted to 30*l.*, gives a settlement." And he cites *St. Paul's, Walden, v. Kimpton* (c), as an authority for the position. That is directly in point. So, in *Gratham v. Sime* (d), it was held, that a covenant to surrender

(a) Which enacts, "that no person shall be deemed to acquire a settlement in any parish or place, by virtue of any purchase of any estate or interest in such parish or place, whereof the consideration for such purchase does not amount to the sum of 30*l.*, *bonâ fide* paid, for any longer time than such person shall inhabit in such estate, and shall then be liable to be removed to such parish or place, where such person was last legally settled, before the said purchase and inhabitancy therein."

(b) Vol. ii. 95, 3rd edit.

(c) *Foley*, 138. "A person pur-

chased a copyhold tenement in *St Paul's, Walden*, which, with the fine, and fees paid to the Court, amounted to 30*l.*; and it appeared that the officers of *Kimpton* had given him 40*s.* towards paying his fine and fees. Therefore it was insisted that this was fraudulent, and not a good purchase within the statute, sufficient to gain a settlement. But by the whole Court: We cannot take notice of its being fraudulent, unless the Justices had adjudged it so. And the order was confirmed."

(d) 1 *East*, 632.

a copyhold to a purchaser, and to make and do all acts, deeds, &c., for the perfect surrendering and assuring the premises at the costs and charges of the seller, was not broken by non-payment of the fine to the lord on the admission of the purchaser. [*Littledale, J.* That case does not bear at all upon the present: Even if the fine to the lord, and the fee to the steward, can be taken into account as part of the purchase money, you have not sufficient value here, without including the expenses of the surrender; and it is impossible to say, that money paid for the expenses of the surrender is part of the consideration for the purchase.] It is clear, that if the consideration mentioned in a deed be less than 30*l.*, other considerations may be given in evidence. *Rex v. Scammonden (a)*. There the pauper claimed a settlement under a deed of conveyance, which stated the consideration to be 28*l.*; but parol evidence was offered to prove that 30*l.* was the real consideration, which evidence the sessions refused to receive. Lord *Kenyon* said, it was clear that the party might prove other considerations than those mentioned in the deed; and cited *Filmer v. Gott (b)*, as an authority in point.

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BAYLEY, J.—I think this is a very clear case against the settlement, and perfectly distinguishable from those cited. In *Rex v. Scammonden*, the purchaser paid the full amount of 30*l.*, for he paid the expenses of levying a fine, which properly fell upon the vendor, but which the vendor had omitted to pay. In *St. Paul's, Walden, v. Kimpton (c)*, 30*l.* was paid, including the fine to the lord, and the fee to the steward, which were properly considered as forming part of the consideration; for I take the consideration to consist of the sums paid by the purchaser to the vendor, to the lord, and to the steward, and of no

(a) 3 T. R. 474.

(b) 7 Bro. P. C. 20, pl. 70.

(c) *Foley*, 138; *supra*, 470.

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other. Here the amount, including all those, is less than 30*l.*; and the expenses of the surrender, paid by the purchaser to his own attorney, cannot be taken into account to cure the deficiency.

The other Judges concurred.

Order of Sessions confirmed.

The KING v. The Inhabitants of WHITCHURCH.

A certificate purporting to be granted in 1758 to a pauper and his family, by four persons, as churchwardens and overseers, was signed by both overseers, and by one churchwarden. The churchwarden was nominated at Easter, and sworn in in September, the usual time for swearing churchwardens, and there was no proof of his

UPON an appeal against the order of two justices, for the removal of *William Bray*, his wife, and their ten children, from the parish of Whitchurch, in the county of Hants, to the parish of St. Mary's Bourne, in the same county; the sessions quashed the order, subject to the opinion of this Court upon the following case:

A certificate was produced by the respondents in words and form as follows: "Southampton to wit. We, *John Harbutt*, *William Piper*, *William Arundel*, and *William Phillpott*, churchwardens and overseers of the poor of the parish of St. Mary's Bourne, in the county of Southampton, do hereby own and acknowledge *William Bray*, junr., and *Elizabeth* his wife, *William* aged about five years, *Mary* aged about three years, and *Elizabeth*, aged about two years, their children, to be our inhabitants legally settled in the said parish of St. Mary's Bourne. In

having been sworn when he signed the certificate. The parish relieved the pauper and his family in another parish, at various times, from 1758 to 1827:—Held, first, that the execution by two overseers and one churchwarden, was an execution by the major part of the churchwardens and overseers, within 8 & 9 W. 3, c. 30; and secondly, that after such a lapse of time, the Court would presume that the churchwarden was sworn before he signed the certificate; and therefore that the certificate was valid. Whether the execution of a certificate by a churchwarden who had not been sworn, would be good, *Quare*.

See 2 Hag. 9045.
Loren. G. 7.

witness whereof, we have hereunto set our hands and seals, this 7th day of September, 1758.

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_____	L. S.	} Churchwardens.
<i>William Piper,</i>	L. S.	
<i>William Arundel,</i>	L. S.	} Overseers.
The Mark of		
<i>William Phillpott,</i>	L. S.	

Attested by us

Thomas May.

Alexander Neave.

To the churchwardens and overseers of the poor of the parish of Whitchurch, in the county aforesaid.

We whose names are hereunto subscribed, two of his majesty's justices of the peace, of and for the county of Southampton aforesaid, do allow of the above-written certificate, and do certify, that *Alexander Neave*, one of the witnesses who attended the execution of the said certificate, hath made oath before us, that he did see the churchwardens and overseers of the said parish, whose hands and seals are subscribed and set to the said certificate, severally sign and seal the same, and the names of the said *Alexander Neave* and *Thomas May*, whose hands are above subscribed as witnesses to the execution of the said certificate, are of their own proper hand writing respectively. Dated the 12th day of September, 1758.

William Russell.

James Plowden."

Richard Loft produced the certificate from the parish chest of Whitchurch; which was admitted as coming from the proper place. It was proved that *William Bray*, jun., the grandfather of the pauper, resided in Whitchurch till the time of his death, in 1799; that *William Bray*, his son, also named in the certificate, had resided there ever since the certificate was granted; and that the pauper had resided there from the time of his birth, till the time of

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his removal under the order. It appeared by the visitation books produced by the registrar of the bishop's court, that St. Mary's Bourne, is in the diocese of Winchester, and is a peculiar within the jurisdiction of the Chancellor's visitation. That *John Harbutt* and *William Piper*, were not sworn churchwardens for St. Mary's Bourne in the year 1758, till the 15th September in that year. That no churchwardens appeared by the books to have been sworn at the visitation, from the year 1751, to 1758. That the visitation book for the year 1750 was lost. It also appeared from the evidence of the registrar, that it was the course of office to make an entry in the visitation books of the swearing of churchwardens, at the time of swearing, whether the swearing takes place at the visitation, or afterwards. That if it took place afterwards, the registrars always entered it, but he had not looked over the books before his time to see whether there was any entry of such subsequent swearings. It appeared, that at Easter 1750, *James Longman* was nominated as churchwarden. That in the year 1757, *Thomas Cowdey*, and *Edmund Maltin*, were nominated churchwardens, and that *John Harbutt* signed the nomination. That at Easter, in the year 1758, *Thomas Harbutt* and *William Piper*, were nominated as churchwardens. It appeared also, that *William Bray*, the pauper, was on the 7th day of December 1790, bound by indenture to his grandfather *William Bray*, jun., named in the certificate, for the term of seven years, which time he served in Whitchurch, and that the pauper had done no act, since the service under the apprenticeship, to gain a settlement. It appeared, that *William Bray*, son of *William Bray*, jun., and the father of the pauper, sixteen or seventeen years ago, received relief from the overseers of St. Mary's Bourne, he at that time residing in Whitchurch. That he has also constantly for these last two years, received relief from the last mentioned parish, and that no objection was made upon his application to the overseers of

that parish for relief, when he required it. It also appeared, that *William Bray*, the pauper, had been occasionally relieved by the parish officers of St. Mary's Bourne, nearly ever since his apprenticeship, whenever he wanted it, and has so received relief constantly for the last seven or eight years. The court of Quarter Sessions thought the certificate inadequately executed, and quashed the order of removal.

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Nolan, Selwyn, and Poulter, in support of the order of sessions. The sessions thought the certificate bad, and they were right in their opinion. It is void *ab origine*, and *in toto*; and no presumption arising from its age, can be allowed to operate in its favour, *Rex v. Margam* (a). The Certificate Act, 8 and 9 W. 3, c. 30, requires the certificate to be under the hands and seals of the churchwardens and overseers, or the major part of *them*, that is, the major part of both, where there are both; *Rex v. Clifton*, (b). *Rex v. St. Margaret's, Leicester* (c). This certificate, though it professes to be executed by both churchwardens, and both overseers, is in fact executed by one churchwarden only, therefore, it is not that which it professes to be, and ought to be, namely, a corporate act, done by the whole corporate body; and is no more binding upon the parish, than a deed purporting to be the deed of four, and executed by only two or three, could be binding upon the rest. But, assuming that execution by three out of four parish officers would be good, still this certificate would be void, because the party executing as churchwarden, was not churchwarden *de jure*, and did not legally fill that character at the period of the execution. He was nominated before, but was sworn in after the date of the certificate, therefore he was not the churchwarden, for by the ecclesiastical law, "the office of all churchwardens is reputed to continue until the new churchwardens

(a) 1 T. R., 775. See *Rex v. Tamworth*, Burr. S. C. 770.

(b) 2 East, 168.

(c) 8 East, 332.

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that shall succeed them be sworn" (a). Churchwardens are of ecclesiastical jurisdiction, and when nominated, and refused to be sworn by the ecclesiastical officer, this Court will grant a mandamus to him who swears them in (b); and the 54 Geo. 3, c. 107, which enacts, that where churchwardens of a parish have granted certificates from townships within it, such certificates shall be good, though they have not been sworn in for the township, contains an express proviso, that they shall have been duly sworn in as churchwardens of the parish. It may be said that the certificate was executed by a party who was churchwarden *de facto*; but that will not help the case; for this was not such an act as a churchwarden *de facto* has authority to do, 4 Vin. Abr. Churchwarden, 527, where it is said, "if there be a churchwarden *de jure*, and a churchwarden *de facto*, in the same parish, this latter cannot justify the laying out of, or receiving money, but he is accountable to the churchwarden *de jure*; he is no more than another man." The cases of *Rex v. Hinckley* (c), *Rex v. Catesby* (d), and *Rex v. Earl Shilton* (e), will probably be relied upon as adverse to the present argument, but they are not so in reality. In those cases the court drew a presumption in favour of the validity of the certificate, because there was no evidence before them to rebut that presumption; here there is positive proof to rebut any presumption that could otherwise be drawn in favour of the certificate. In *Rex v. Austrey* (f), a certificate 30 years old, signed by two churchwardens and one overseer, but bearing only two seals, was held to be not properly executed; and the doctrine of presumption was not attempted to be prayed in

(a) 1 Burn's E. L. 410; Can. 118; *Foot v. Prowse*, 1 Stra. 625.

(b) *Rex v. Harris*, 3 Burr. 1420; Com. Dig. Mandamus(a); Anon. 2 Chitty Rep. 254.

(c) 12 East, 361.

(d) 4 D. & R. 434; 2 B. & C. 884; 2 D. & R. M. C. 278.

(e) 6 D. & R. 104; 2 D. & R. M. C. 525.

(f) 1 Phillipps on Evidence, (5th edition), 469.

aid of the instrument, because it appeared upon the face of it not to be executed by all those by whom it purported to be granted. Again, the statement of the attestation of this certificate is false, and renders it void. The attesting witness is represented to have sworn to the execution of the certificate by all the parish officers, though it is in fact executed by only three. The age of the instrument might have rendered this mode of proof unnecessary; but as it has been resorted to, the misdescription is fatal; and besides, the magistrates allowing the certificate, may have been deceived by it, and then the instrument is bad, because the allowance was fraudulently obtained. Lastly, if the certificate is bad in any of these respects, the circumstance of its having been acted upon, and the parties having been relieved under it, for however long a period, will not render it valid, because that has been done under a mistaken belief, that the parties were duly certificated.

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Dampier and H. Bosanquet, contra. The Court will intend every thing in favour of this certificate, and will hold it to be valid, if consistently with law they possibly can. The pauper and his family have received relief under it from the parish of St. Mary's Bourne, at various times from the year 1758, a period of almost 70 years, and during the whole of that period, the officers of that parish have known of the existence of the certificate, have acted upon it, and have treated it as a valid instrument. Their own conduct, therefore, has raised the strongest possible presumption in favour of its validity, and it is now too late for them to dispute it. It is said that the doctrine of presumption cannot be applied to this case; but the authorities upon that point, cited by the other side, shew that it may; and there are other authorities to the same effect. In *Rex v. Long Buckby (a)*, the Sessions presumed that an indenture of apprenticeship executed 30 years before, and

(a) 7 East, 45; 3 Smith, 92, nom. *R. v. Long Buckley*.

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under which the apprentice had regularly served his time for seven years, when the indenture was given up to him, and proved to have been lost, and when the parish in which he was settled, under the indenture, had relieved him for the last twelve years; was properly stamped in proportion to the apprentice fee of 12*l.*, received by the master, although the deputy-registrar and comptroller of the stamp duties proved that it did not appear in the office that any such indenture had been stamped or enrolled during that period; and the judgment of the justices was confirmed by this Court. The intendment of law ought to be as strong in a case of this nature, as in the case of an estate or an easement, where long enjoyment is evidence so conclusive, that, as Lord *Coke* lays it down, the Court will presume an act of Parliament, rather than defeat long possession. There are two grounds upon which this certificate may be supported: first, because the certifying parish are bound by the recitals in their own certificate, at least as against the certified parish; and secondly, upon the general principle that one party treating with another, and representing himself as filling a particular character, is estopped from afterwards denying that he did fill that character. The objection that the churchwarden was incompetent to act, because he had not been sworn, has no weight. There is no evidence of any churchwardens having been sworn in from the year 1761 to the year 1768. It may, therefore, be inferred, that the churchwardens of 1768, held over; and if so, they must be considered as having been virtually re-elected; in which case, it would not be necessary that they should be re-sworn, and thus they would be, *de jure*, as well as *de facto*, the churchwardens. But at any rate, the executing churchwarden was churchwarden *de facto*; and that was sufficient to render him competent to act (*a*); for it was decided in *Rex v. Wyndham* (*b*), that a certificate signed by a majority of the parish officers *de facto*, was

(*a*) *R. v. Mitchell*, Mann. N. P. Digest, 132.

(*b*) 6 T. R. 552.

valid, and that the Court would not inquire into the validity of the titles of the officers who signed the certificate. The ceremony of swearing in is not necessary to give the churchwarden authority to act; he may execute the duties of his office before he is sworn in; 4 Vin. Abr. tit Churchwarden, page 526., where it said, "a churchwarden may execute his office before he is sworn, though it is convenient that he should be sworn;" and where 1 Vent. 267., and Noy. 139, are referred to as authorities for the position. The main ground, however, is, that this certificate must, from its age, be presumed to have been duly executed, and for that, *Rex v. Catesby (a)*, is an express authority. It was there said by *Littledale, J.*, "the intendment that every thing is to be presumed to be right according to law, is a general intendment, and, I think, ought to prevail, especially in a case of this description, until the contrary is shewn." And again, "this certificate is a public document, and though not framed by justices of the peace, yet being the act of the parish officers, the Court, for the same reason that it intends every thing in favour of an order of justices, will intend every thing in favour of an instrument made by parish officers." The same general intendment must be made in this case, as was made in that, and upon that ground, if upon no other, this certificate must be held to be valid.

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BAYLEY, J.—The certificate, upon the validity of which the question in this case turns, was granted in the year 1758, a period of no less than 69 years ago. It contains the names of four persons, whom it describes as churchwardens and overseers of the parish of St. Mary's Bourne, and it is signed by three of those persons, who thereby hold themselves out as such churchwardens and overseers; namely, by two overseers and by one churchwarden. The principal objection raised against the validity of the certificate is, that the churchwarden whose

(a) 4 D. & R. 434; 2 B. & C. 814; 2 D. & R. M. C. 278.

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signature is affixed to it, was not sworn into office until after the day on which it bears date; and, therefore, it has been contended, that his execution being an act done before he was sworn in, was done without authority, and is not binding upon the parish. Now, though the fact may be, that at the time when he executed this certificate he had not taken the oath of office, still the other parish into which the pauper went, and in which, in consequence of his having the certificate he was suffered to reside, must have been equally imposed upon, and must have been induced to believe that the certificate was genuine, and had been executed by competent officers. If we were bound in point of law to allow this objection, we must do so, notwithstanding the grievous injustice which would result from it, and though one of the consequences would be, that no prudent person would from henceforth receive a certificate, and the object of the statute would be entirely defeated. But, as it seems to me, it is by no means necessary, in order to render such an act as this binding upon the parish, that the churchwarden shall have been previously sworn in. The parish may allow him to act as their officer *de facto*, though there may be another who is officer *de jure*; and if they do hold him out as churchwarden *de facto*, and suffer him to act in that capacity, they cannot be permitted to practice the fraud of afterwards denying the validity of his acts. At present, therefore, I am disposed to think that the fact of the churchwarden's not having been sworn in until after the execution of the certificate, does not vacate it. It is clear, from the statement in the case, that the parish have all along, almost from the year 1758, down to the time when the present order of removal was made, been acting upon the certificate as good and valid. It is not, then, in my opinion, too much for us to presume that it is so; and I think cases may be put from which we may assume it to be really valid. It may have happened, for instance, that the churchwardens were first sworn in at, or shortly after their nomination,

and were afterwards sworn in again at the visitation in September. *Piper*, the only person respecting whom there is any dispute, may have wished to be, and may actually have been sworn in at Easter, although the administration of the oath was not recorded, and may afterwards, in September, have been required to take the oath again. We may presume this, and I think it is perfectly fair and reasonable to presume it. To the other parish these persons were held out as churchwardens duly and legally appointed; and unless some such presumption as I have suggested is admitted, we must on the other hand be driven to presume, that which a court of law never can presume, that a fraud was contemplated and practised. I am, therefore, of opinion, that justice requires us to presume that the churchwarden had been sworn in when he executed this certificate; and then it follows that the certificate is valid, and it becomes unnecessary to decide upon the other points raised in the case.

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LITLEDALE, J. (a). I am of the same opinion. If it were necessary to decide the question of law, whether the execution of a certificate is an act which a churchwarden *de facto*, who has not been sworn in, has authority to do, I should wish for time to consider that point, upon which I at present entertain great doubts. But I think we need not decide that question, because the lapse of time is quite sufficient to justify us in presuming, that every thing necessary to be done to make the certificate valid and binding, was done (b). I think that we may fairly presume that *Piper*, upon his nomination to the office, went before the commissary and took the oath, and that the fact of his having taken it at that time, was, from some circumstance or other, omitted to be registered. We cannot presume fraud and illegality, which we must do, if we decide against the certificate upon this objection. With respect to the supposed necessity of both the churchwardens signing the

(a) *Holroyd*, J., was absent. (b) *Ante*, 407.

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certificate, the statute only requires that the major part of the aggregate body of churchwardens and overseers shall sign, and not that the major part of each of these classes of officers shall sign. Upon the whole, it seems to me that we must consider this as a valid certificate, and therefore that the order of sessions must be quashed.

Order of Sessions quashed.

(a) See *Reg v. Headley*, ante. 345.

BENNETT v. EDWARDS.

The refusal by an overseer to allow a parishioner an inspection of a poor rate, constitutes the parishioner a party aggrieved, and the overseer a defaulter, within 17 *Geo.* II., c. 3, s. 3.

Whether an assistant overseer, is a person within that statute, *quære*; but in an action against him upon that statute, it must be proved that, under his appointment by the select vestry, it is his duty to produce the rate.

DEBT, upon the statute 17 *Geo.* II., c. 3, for penalties. The first count of the declaration stated, that plaintiff was an inhabitant of the parish of Almondsbury, in the county of Gloucester, and that defendant was one of the overseers of the poor of that parish; that on the 1st March, 1827, at, &c., the churchwardens and overseers of the parish made a certain rate for the relief of the poor of the parish, which rate was afterwards allowed by two justices of the county, and published by the churchwardens and overseers; that afterwards, and at a reasonable time in that behalf, to wit, on, &c., at, &c., plaintiff requested defendant, as such overseer, to permit him to inspect the rate, and then and there tendered to defendant one shilling for the same; and that although defendant, as such overseer, then and there had the rate in his possession, he did not, nor would, permit plaintiff to inspect it; concluding with a claim for 20*l.* as a forfeiture under the statute. Second count, for not furnishing a copy of the rate. Third count, for refusing a copy of another rate. There was a second set of counts, similar to the first, except that they described defendant as an *assistant* overseer. Plea, *nil debet*; and issue thereon. At the trial before *Littledale, J.*, at the last summer assizes for the county of Gloucester (b), the case was this. The plaintiff was a rated

(b) Counsel for the plaintiff, *Campbell* and *Phillipotts*; for the defendant, *Taunton, Ludlow*, Serjt., and *Justice*.

inhabitant of the parish of Almondsbury, and the defendant, one of the assistant overseers of that parish, having been appointed by the select vestry. The plaintiff, accompanied by his attorney, Mr. *Steel*, repeatedly applied to the defendant, at his house, for an inspection of the rate in question, tendering him the legal fee for that purpose. The defendant always refused to shew the rate, sometimes absolutely, and on other occasions, in a qualified way, referring the plaintiff to the select vestry, under whose orders he said he was acting, and who had authorized him to decline shewing the rates at his own house. He admitted that the rate was in his possession. The action was brought before the quarter sessions, next after the allowance of the rate, at which the plaintiff would have been entitled to appeal against it. Several objections were taken at the trial on the part of the defendant, against the plaintiff's right to recover; but the two upon which the subsequent argument, and the decision of the Court, mainly proceeded, were these: First, that the plaintiff had not alleged in his declaration, or proved in evidence, that he was a "party grieved," by the refusal of the defendant to allow him to inspect the rate, within the provisions of s. 3 of the statute (a); and that he could not

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(a) Which enacts, "that if any churchwarden or overseer of the poor, or other person authorized as aforesaid, (that is, authorized to take care of the poor), shall not permit *any inhabitant or parishioner* to inspect the said rates, or shall refuse or neglect to give copies thereof as aforesaid, such churchwarden or overseer, or other person authorized as aforesaid, for every such offence shall forfeit and pay to the party aggrieved the sum of 20*l.*, &c."

"that the churchwardens and overseers of the poor, or other persons authorized as aforesaid, in every parish, township, or place, shall permit *all and every the inhabitants* of the said parish, township, or place, to inspect every such rate at all seasonable times, paying one shilling for the same; and shall, upon demand, forthwith give copies of the same, or any part thereof, to *any inhabitant* of the said parish, township, or place, paying at the rate of sixpence for every twenty-four names."

The previous section (2) enacts,

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maintain the action without shewing that he had sustained some actual injury by the refusal. In support of this objection, *Spenceley v. Robinson* (a), was cited, and relied upon as an express authority. Second, that this action being founded on the 17 Geo. 2, c. 3, could not be maintained against the defendant, who was only an assistant overseer, appointed under the authority of distinct statutes, 58 Geo. 3, c. 69; and 59 Geo. 3, c. 85. Upon the first of these objections, the learned Judge, upon the authority of the case cited, though against his own opinion, nonsuited the plaintiff, with leave for him to enter a verdict for one penalty.

Campbell having obtained a rule nisi accordingly,


Taunton, Ludlow, Serjt., and Justice, shewed cause against it. *Spenceley v. Robinson* (b), is decisive to shew that the plaintiff in this case, is not a party aggrieved, within the meaning of the statute 17 Geo. 2, c. 3, s. 3, and therefore not entitled to maintain this action. The observations of the Court in that case, upon this point, apply directly to the present. Abbott, C. J., said, "The words of the statute giving the penalty appear to me to import, that there must be some person who has sustained an injury by the act of the overseer, before any penalty is incurred. Unless there be some party aggrieved, I do not see how it is competent for him to sue. Now, was this plaintiff aggrieved by any thing done by the defendant? If he meant to appeal, (and probably he did), he might have entered his appeal at the next sessions, and then have given a notice in order that it might be heard at the following sessions, the justices having power to direct

(a) 5 D. & R. 572; 3 B. & C. 111; 17 Geo. 2, c. 3, s. 3. (b) 1 D. & R. 658; 2 D. & R. M. G. 561, where it was decided that a rated inhabitant of a parish cannot sue an overseer for the penalty given by 17 Geo. 2, c. 3, s. 3, for refusing an inspection of the rate books, unless he shews that he has been injured by the refusal.

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an adjournment?" and *Holroyd, J.*, said, "I am also of opinion that the plaintiff was not a party aggrieved. He could not be said to be aggrieved, unless he was placed in a worse situation with respect to his rights. There is no proof that he was in any respect aggrieved, because he might still have entered an appeal at the sessions, supposing the refusal to have taken place."—[*Bayley, J.* The difference between that case and the present is, that there was no absolute refusal to shew the rate there; there was a qualified refusal, followed by a speedy compliance, and by an actual delivery of a copy of the rate, even earlier than was either necessary or reasonable. Here, the refusal was absolute, and repeated; and the plaintiff did not obtain a sight of the rate. Surely then he was a party aggrieved. He had a right to see the rate, and the mere denial of that right was a grievance.] The only possible grievance the plaintiff here could sustain, was the being debarred the opportunity of appealing; which did not occur, for it is admitted that he might have appealed. The withholding a sight of the rate books, under the particular circumstances of this case, was not an absolute refusal; he should have demanded a copy of the rate, and then if that had been refused, the case would have been different. [*Holroyd, J.* He was not bound to incur the expense of having a copy; he had a right to see the book.] It was clear that the defendant had acted throughout under the orders of the vestry, to whom he referred the plaintiff. His refusal, therefore, was a qualified one, and then this case comes within the view now taken by the Court, of *Spenceley v. Robinson*." [*Bayley, J.* But what authority had the defendant so to qualify his refusal? He was not justified by law to impose such terms upon the plaintiff. He had no right to send him to the vestry. He admitted that the rate was in his own possession, and the statute directs the demand to be made upon the churchwardens and overseers, and makes them liable to the penalty for

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refusing. *Holroyd, J.* If the plaintiff had gone to the vestry, he would have been no nearer seeing the rate, because it was in the defendant's house]. The defendant was an assistant overseer, appointed under the 58 Geo. 3, c. 69, and 59 Geo. 3, c. 85, by which the custody of the rates is taken from the overseers, and given to the select vestry. [*Littledale, J.* But here the defendant, in fact, had the custody of the rate; it was in his own house; and there was no proof that the vestry had ordered him not to shew it there]. Then, secondly, this action, being founded upon one act of Parliament, is not maintainable against the defendant, who is an assistant overseer, appointed under a different act of Parliament. At least, the plaintiff has not gone far enough with his proof, for he has not shewn that an assistant overseer is a person within the description in the 17 Geo. II., c. 3, whose duty it is to give inspection of the rates. The modern statutes under which the defendant was appointed, empower the vestry to determine and to specify what duties the assistant overseer shall perform. The plaintiff, who was referred to the vestry by the defendant, should have applied to them, and have ascertained the nature and extent of the defendant's duties. The defendant had given bond to the vestry for the due discharge of his duties; he was bound to obey the directions of the vestry; and having acted *bonâ fide* in obedience to their orders, he is not liable to this action. The plaintiff's only remedy is against the officers named in the 17 Geo. II., c. 3, which does not name assistant overseers, nor indeed could, because there were, at the date of that act, no such officers in existence; and even if an assistant overseer could be deemed to come within the description of "other person or persons authorized to take care of the poor," which he cannot, still the defendant is not so described in the declaration, and is therefore not brought within the operation of that act.

Campbell and Phillpotts, contra. First, the plaintiff was a party aggrieved within the meaning of the 17 Geo. 2, c. 3. *Spenceley v. Robinson* (a), was a very different case from the present, and is by no means decisive of it on this point. There was no pretence for bringing that action. The refusal there, which was made, once only and in a qualified manner, was taken the most hasty and unfair advantage of; and the real ground upon which the Court seem to have decided in favour of the defendant, was, that the plaintiff did not make his demand at a reasonable time and place. The observations of the learned Judges, therefore, which have been cited on the other side, are inapplicable to this case, though one of them, namely, that respecting the power of appeal, seems capable of an answer. The notice of an appeal against a rate, must specify the particular grounds of appeal (b); but unless a party obtains an inspection of the rate, it is impossible for him to ascertain whether he has grounds of appeal against it or not; the mere refusal, therefore, is a grievance, because it deprives him of the means necessary for the exercise of his right of appeal. Secondly, the defendant is within the descriptive words of the 17 Geo. 2, c. 3, and liable to this action. The words are, "overseers, or other persons authorized to take care of the poor." Now, though the defendant is an *assistant* overseer, he is, nevertheless, an *overseer*, and a person appearing and acting in that character; but even if he were not, at least he is a person authorized to take care of the poor: and, in either view of the case, he is within the provisions of the statute. He may be for some purposes subject to the control of the vestry, but still, as between the parish officers and the parishioners at large, he clearly stands in the situation of an overseer. If he is not liable to this action, this injustice will follow—that the plaintiff has no remedy at all; for it would be difficult to say that any other per-

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(a) *Ante*, 484.

(b) 41 Geo. 3, c. 23, s. 4.

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now is in default, the defendant being the person who had possession of the rate, and, in fact, refused to exhibit it.

BAYLEY, J.—Upon the first point in this case, we none of us entertain any doubt. We are all clearly of opinion, that the plaintiff is a party aggrieved within the meaning of the act of Parliament, inasmuch as the defendant's denial of his right to inspect the rate was a grievance in itself. We also consider the defendant's refusal quite absolute enough to constitute such a denial; because, as he had by law no right to impose the terms which he attempted to impose upon the plaintiff, those terms cannot operate as any qualification of his refusal. Upon the second point, which raises a somewhat novel and considerably important question, we shall take time for deliberation.

Cur. adv. vult.

Judgment was afterwards delivered by

BAYLEY, J., who, after shortly recapitulating the facts of the case, and the nature of the question, thus proceeded:—If we could have seen clearly and satisfactorily that the defendant was such an assistant overseer, that it was a part of his duty to afford inspection, and deliver copies of the rates, upon demand, we should all have been of opinion that he was liable in this action, and that the verdict ought to be entered for the plaintiff. But the statutes which authorize the appointment of assistant overseers, do not specify their particular duties; they merely declare that they shall have such powers as the select vestries shall confer upon them at the time of their appointment. For all that appeared in this case it was possible, either that the defendant had all the powers, and was liable to all the duties of an overseer, or that he had only limited powers, and was liable to certain speci-

and duties only. There was no evidence to shew what were his powers, or what were his duties, as an assistant overseer, or that the refusal to allow an inspection of a rate, for the neglect of which the action was brought, was one of those duties. We are, therefore, of opinion, that we ought not to direct a verdict to be entered for the plaintiff, but that we ought to send the case to a new trial.

1827.
Barnett
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Bowditch.

Rule absolute for a new trial.

HUDSON v. RICHARD SMITH, Gent., one, &c.

DEBT on bond for 1000*l*. The defendant cravedoyer of the bond, which appeared to be the joint and several obligation of *John Smith* and defendant. He also cravedoyer of the condition, which was as follows:—"Whereas the said *William Hudson* hath lent to the said *John Smith* the sum of 900*l*. three per cent. Reduced Annuities, of the Governor and Company of the Bank of England: Now the condition of the above obligation is such, that if the said *John Smith*, his executors, &c., do and shall, upon three months' notice, in writing, from the said *William Hudson*, transfer to and replace in the name of the said *William Hudson*, in the books of the said Governor and Company, the sum of 900*l*. three per cent. Reduced Annuities, with all dividends which shall accrue upon the same from the date of these presents, then this obligation to be void, &c." The defendant then pleaded

To debt on bond conditioned to replace stock, with all dividends "which shall accrue due upon the same, from the date of the bond," upon three months' notice, the defendant pleaded that plaintiff did not give three months' notice to replace the stock, with the dividends which would have become due for the same from the

date of the bond. Replication alleged, that more than three months before action, plaintiff gave notice, at the expiration of three months to replace the stock, with all dividends, which had become due from the date of the bond; and then went on to assign a breach in the non-transfer of the stock:—Held, that the notice set out in the replication was sufficient; and that the assignment of the breach was unnecessary and informal, but that the objection could be taken only by way of special demurrer for duplicity.

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certificate, the statute only requires that the major part of the aggregate body of churchwardens and overseers shall sign, and not that the major part of each of those classes of officers shall sign. Upon the whole, it seems to me that we must consider this as a valid certificate, and therefore that the order of sessions must be quashed.

Order of Sessions quashed.

(a) See *Rex v. Headley*, ante, 345.

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The refusal by an overseer to allow a parishioner an inspection of a poor rate, constitutes the parishioner a party aggrieved, and the overseer a defaulter, within 17 *Geo.* II., c. 3, s. 3.

Whether an assistant overseer, is a person within that statute, *quære*; but in an action against him upon that statute, it must be proved that, under his appointment by the select vestry, it is his duty to produce the rate.

DEBT, upon the statute 17 *Geo.* II., c. 3, for penalties. The first count of the declaration stated, that plaintiff was an inhabitant of the parish of Almondsbury, in the county of Gloucester, and that defendant was one of the overseers of the poor of that parish; that on the 1st March, 1827, at, &c., the churchwardens and overseers of the parish made a certain rate for the relief of the poor of the parish, which rate was afterwards allowed by two justices of the county, and published by the churchwardens and overseers; that afterwards, and at a reasonable time in that behalf, to wit, on, &c., at, &c., plaintiff requested defendant, as such overseer, to permit him to inspect the rate, and then and there tendered to defendant one shilling for the same; and that although defendant, as such overseer, then and there had the rate in his possession, he did not, nor would, permit plaintiff to inspect it; concluding with a claim for 20*l.* as a forfeiture under the statute. Second count, for not furnishing a copy of the rate. Third count, for refusing a copy of another rate. There was a second set of counts, similar to the first, except that they described defendant as an *assistant* overseer. Plea, *nil debet*; and issue thereon. At the trial before *Littledale, J.*, at the last summer assizes for the county of Gloucester (b), the case was this. The plaintiff was a rated

(b) Counsel for the plaintiff, *Campbell* and *Phillpotts*; for the defendant, *Taunton, Ludlow, Serjt.*, and *Justice*.

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inhabitant of the parish of Almondsbury, and the defendant, one of the assistant overseers of that parish, having been appointed by the select vestry. The plaintiff, accompanied by his attorney, Mr. Steel, repeatedly applied to the defendant, at his house, for an inspection of the rate in question, tendering him the legal fee for that purpose. The defendant always refused to shew the rate, sometimes absolutely, and on other occasions, in a qualified way, referring the plaintiff to the select vestry, under whose orders he said he was acting, and who had authorized him to decline shewing the rates at his own house. He admitted that the rate was in his possession. The action was brought before the quarter sessions, next after the allowance of the rate, at which the plaintiff would have been entitled to appeal against it. Several objections were taken at the trial on the part of the defendant, against the plaintiff's right to recover; but the two upon which the subsequent argument, and the decision of the Court, mainly proceeded, were these: First, that the plaintiff had not alleged in his declaration, or proved in evidence, that he was a "party grieved," by the refusal of the defendant to allow him to inspect the rate, within the provisions of s. 3 of the statute (a); and that he could not

(a) Which enacts, "that if any churchwarden or overseer of the poor, or other person authorized as aforesaid, (that is, authorized to take care of the poor), shall not permit *any inhabitant or parishioner* to inspect the said rates, or shall refuse or neglect to give copies thereof as aforesaid, such churchwarden or overseer, or other person authorized as aforesaid, for every such offence shall forfeit and pay to the party aggrieved the sum of 20l., &c."

"that the churchwardens and overseers of the poor, or other persons authorized as aforesaid, in every parish, township, or place, shall permit *all and every the inhabitants* of the said parish, township, or place, to inspect every such rate at all seasonable times, paying one shilling for the same; and shall, upon demand, forthwith give copies of the same, or any part thereof, to *any inhabitant* of the said parish, township, or place, paying at the rate of sixpence for every twenty-four names."

The previous section (2) enacts,

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maintain the action without shewing that he had sustained some actual injury by the refusal. In support of this objection, *Spenceley v. Robinson* (a), was cited, and relied upon as an express authority. Second, that this action being founded on the 17 Geo. 2, c. 3, could not be maintained against the defendant, who was only an assistant overseer, appointed under the authority of distinct statutes, 58 Geo. 3, c. 69, and 59 Geo. 3, c. 85. Upon the first of these objections, the learned Judge, upon the authority of the case cited, though against his own opinion, nonsuited the plaintiff, with leave for him to enter a verdict for one penalty.

Campbell having obtained a rule nisi accordingly,

Taunton, Ludlow, Serjt., and Justice, shewed cause against it. *Spenceley v. Robinson* (b), is decisive to shew that the plaintiff in this case, is not a party aggrieved, within the meaning of the statute 17 Geo. 2, c. 3, s. 3, and therefore not entitled to maintain this action. The observations of the Court in that case, upon this point, apply directly to the present. *Abbott, C. J.*, said, "The words of the statute giving the penalty appear to me to import, that there must be some person who has sustained an injury by the act of the overseer, before any penalty is incurred. Unless there be some party aggrieved, I do not see how it is competent for him to sue. Now, was this plaintiff aggrieved by any thing done by the defendant? If he meant to appeal, (and probably he did), he might have entered his appeal at the next sessions, and then have given a notice in order that it might be heard at the following sessions, the justices having power to direct

(a) 5 D. & R. 572; 3 B. & C. 211; 17 Geo. 2, c. 3, s. 3. 658; 2 D. & R. M. G. 551, where it was held, that a person who refused an inspection of the one of the points decided was, that a rated inhabitant of a parish has been injured by the refusal. cannot sue an overseer for the penalty given by 17 Geo. 2, c. 3, s. 3. (b) 10 B. & C. 101.

an adjournment," and *Holroyd, J.*, said, "I am also of opinion that the plaintiff was not a party aggrieved. He could not be said to be aggrieved, unless he was placed in a worse situation with respect to his rights. There is no proof that he was in any respect aggrieved, because he might still have entered an appeal at the sessions, supposing the refusal to have taken place."—[*Bayley, J.* The difference between that case and the present is, that there was no absolute refusal to shew the rate there; there was a qualified refusal, followed by a speedy compliance, and by an actual delivery of a copy of the rate, even earlier than was either necessary or reasonable. Here, the refusal was absolute, and repeated, and the plaintiff did not obtain a sight of the rate. Surely then he was a party aggrieved. He had a right to see the rate, and the mere denial of that right was a grievance.] The only possible grievance the plaintiff here could sustain, was the being debarred the opportunity of appealing; which did not occur, for it is admitted that he might have appealed. The withholding a sight of the rate books, under the particular circumstances of this case, was not an absolute refusal; he should have demanded a copy of the rate, and then if that had been refused, the case would have been different. [*Holroyd, J.* He was not bound to incur the expense of having a copy; he had a right to see the book.] It was clear that the defendant had acted throughout under the orders of the vestry, to whom he referred the plaintiff. His refusal, therefore, was a qualified one, and then this case comes within the view now taken by the Court, of *Spenceley v. Robinson*. [*Bayley, J.* But what authority had the defendant so to qualify his refusal? He was not justified by law to impose such terms upon the plaintiff. He had no right to send him to the vestry. He admitted that the rate was in his own possession, and the statute directs the demand to be made upon the churchwardens and overseers, and makes them liable to the penalty for

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refusing. *Holroyd, J.* If the plaintiff had gone to the vestry, he would have been no nearer seeing the rate, because it was in the defendant's house]. The defendant was an assistant overseer, appointed under the 58 Geo. 3, c. 69, and 59 Geo. 3, c. 85, by which the custody of the rates is taken from the overseers, and given to the select vestry. [*Littledale, J.* But here the defendant, in fact, had the custody of the rate; it was in his own house; and there was no proof that the vestry had ordered him not to shew it there]. Then, secondly, this action, being founded upon one act of Parliament, is not maintainable against the defendant, who is an assistant overseer, appointed under a different act of Parliament. At least, the plaintiff has not gone far enough with his proof, for he has not shewn that an assistant overseer is a person within the description in the 17 Geo. II., c. 3, whose duty it is to give inspection of the rates. The modern statutes under which the defendant was appointed, empower the vestry to determine and to specify what duties the assistant overseer shall perform. The plaintiff, who was referred to the vestry by the defendant, should have applied to them, and have ascertained the nature and extent of the defendant's duties. The defendant had given bond to the vestry for the due discharge of his duties; he was bound to obey the directions of the vestry; and having acted *bonâ fide* in obedience to their orders, he is not liable to this action. The plaintiff's only remedy is against the officers named in the 17 Geo. II., c. 3, which does not name assistant overseers, nor indeed could, because there were, at the date of that act, no such officers in existence; and even if an assistant overseer could be deemed to come within the description of "other person or persons authorized to take care of the poor," which he cannot, still the defendant is not so described in the declaration, and is therefore not brought within the operation of that act.

Campbell and Phillpotts, contra. First, the plaintiff was a party aggrieved within the meaning of the 17 Geo. 2, c. 3. *Spenceley v. Robinson* (a), was a very different case from the present, and is by no means decisive of it on this point. There was no pretence for bringing that action. The refusal there, which was made once only and in a qualified manner, was taken the most hasty and unfair advantage of; and the real ground upon which the Court seem to have decided in favour of the defendant, was, that the plaintiff did not make his demand at a reasonable time and place. The observations of the learned Judges, therefore, which have been cited on the other side, are inapplicable to this case, though one of them, namely, that respecting the power of appeal, seems capable of an answer. The notice of an appeal against a rate, must specify the particular grounds of appeal (b); but unless a party obtains an inspection of the rate, it is impossible for him to ascertain whether he has grounds of appeal against it or not; the mere refusal, therefore, is a grievance, because it deprives him of the means necessary for the exercise of his right of appeal. Secondly, the defendant is within the descriptive words of the 17 Geo. 2, c. 3, and liable to this action. The words are, "overseers, or other persons authorized to take care of the poor." Now, though the defendant is an *assistant* overseer, he is, nevertheless, an *overseer*, and a person appearing and acting in that character; but even if he were not, at least he is a person authorized to take care of the poor: and, in either view of the case, he is within the provisions of the statute. He may be for some purposes subject to the control of the vestry, but still, as between the parish officers and the parishioners at large, he clearly stands in the situation of an overseer. If he is not liable to this action, this injustice will follow—that the plaintiff has no remedy at all; for it would be difficult to say that any other per-

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(a) *Ante*, 484.

(b) 41 Geo. 3, c. 23, s. 4.

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son is in default, the defendant being the person who had possession of the rate, and, in fact, refused to exhibit it.

BAYLEY, J.—Upon the first point in this case, we none of us entertain any doubt. We are all clearly of opinion, that the plaintiff is a party aggrieved within the meaning of the act of Parliament, inasmuch as the defendant's denial of his right to inspect the rate was a grievance in itself. We also consider the defendant's refusal quite absolute enough to constitute such a denial; because, as he had by law no right to impose the terms which he attempted to impose upon the plaintiff, those terms cannot operate as any qualification of his refusal. Upon the second point, which raises a somewhat novel and considerably important question, we shall take time for deliberation.

Cur. adv. vult.

Judgment was afterwards delivered by

BAYLEY, J., who, after shortly recapitulating the facts of the case, and the nature of the question, thus proceeded:—If we could have seen clearly and satisfactorily that the defendant was such an assistant overseer, that it was a part of his duty to afford inspection, and deliver copies of the rates, upon demand, we should all have been of opinion that he was liable in this action, and that the verdict ought to be entered for the plaintiff. But the statutes which authorize the appointment of assistant overseers, do not specify their particular duties; they merely declare that they shall have such powers as the select vestries shall confer upon them at the time of their appointment. For all that appeared in this case, it was possible, either that the defendant had all the powers, and was liable to all the duties of an overseer, or that he had only limited powers, and was liable to certain speci-

and duties only. There was no evidence to shew what were his powers, or what were his duties, as an assistant overseer, or that the refusal to allow an inspection of a rate, for the neglect of which the action was brought, was one of those duties. We are, therefore, of opinion, that we ought not to direct a verdict to be entered for the plaintiff, but that we ought to send the case to a new trial.


1817.
Brett
v.
Rowlands.

Rule absolute for a new trial.

HUDSON v. RICHARD SMITH, Gent., one, &c.

DEBT on bond for 1000*l*. The defendant craved oyer of the bond, which appeared to be the joint and several obligation of *John Smith* and defendant. He also craved oyer of the condition, which was as follows:—"Whereas the said *William Hudson* hath lent to the said *John Smith* the sum of 900*l*. three per cent. Reduced Annuities, of the Governor and Company of the Bank of England: Now the condition of the above obligation is such, that if the said *John Smith*, his executors, &c., do and shall, upon three months' notice, in writing, from the said *William Hudson*, transfer to and replace in the name of the said *William Hudson*, in the books of the said Governor and Company, the sum of 900*l*. three per cent. Reduced Annuities, with all dividends which shall accrue upon the same from the date of these presents, then this obligation to be void, &c." The defendant then pleaded six pleas, setting out stock-jobbing transactions, upon the date of the bond. Replication alleged, that more than three months before action, plaintiff gave notice, at the expiration of three months to replace the stock, with all dividends, which had accrued due from the date of the bond, and then went on to assign a breach in the non-transfer of the stock;—Held, that the notice set out in the replication was sufficient; and that the assignment of the breach was unnecessary and informal, but that the objection could be taken only by way of special demurrer for duplicity.

To debt on bond conditioned to replace stock, with all dividends "which shall accrue due upon the same, from the date of the bond," upon three months' notice, the defendant pleaded that plaintiff did not give three months' notice to replace the stock, with the dividends which would have become due for the same from the

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which issues were taken. Seventh plea, *Onerari non*; because he saith that plaintiff did not give to said *John Smith* three months' notice in writing, to transfer to, and replace in, the name of plaintiff, in the books of said Governor and Company, the said sum of 900*l.* three per cent. Reduced Annuities, with the dividends *which would have accrued* upon the same from the date of the said supposed writing obligatory, but wholly neglected and refused so to do. (Conclusion as before). 8th plea—No notice from the plaintiff to the said *John Smith* to transfer and replace the sum of 900*l.* three per cent. Reduced Annuities, or to pay him the dividends, &c. 9th plea—That plaintiff did not give to *John Smith* such notice as is in the said condition of said supposed writing obligatory in that behalf mentioned, but wholly neglected and omitted so to do. 10th plea—That plaintiff did not give such notice as in the said condition of said supposed writing obligatory is in that behalf mentioned, but wholly neglected, and omitted so to do. Replication to 7th plea, *precludi non*, because he says, that after the making of the said writing obligatory, and more than three months before the commencement of this suit, to wit, on the 30th day of June, 1826, at, &c., plaintiff did give to said *John Smith* a certain notice, in writing, bearing date, &c.; and did thereby require said *John Smith*, at the expiration of three months from the date of said notice, to transfer to, and replace in, the name of plaintiff, in the said books, &c., the said sum of 900*l.* three per cent. Reduced Annuities, with all the dividends *which had accrued* due on the same from the 5th day of November, 1818, being the day of the date of the said writing obligatory. Nevertheless, plaintiff, for assigning a breach of the said condition of the said writing obligatory, according to the form of the statute in such case made and provided (a), saith, that although three months, from the time of giving said notice to the said *John*

(a) 8 & 9 Will. III. cap. 11, sec. 8, any further breaches are committed, which directs, that if after judgment the plaintiff may sue out a *sci. fa.*

Smith, had elapsed before the commencement of this suit, to wit, at, &c., yet the said *John Smith* did not, nor would, although afterwards often requested so to do by said plaintiff, to wit, at, &c., transfer to, or replace in the name of said plaintiff, in the books of, &c., the sum of 900*l.* three per cent. Reduced Annuities, with all or any of the dividends which had accrued due on the same from the date of the said writing obligatory, but wholly neglected and omitted so to do. Averment, that plaintiff, by reason of the said breach of the said condition, of the said writing obligatory, hath sustained damage (a) to a large amount, that is to say, to the value of 1000*l.*, to wit, at, &c. Verification and prayer of judgment. Similar replications to 8th, 9th, and 10th pleas. To these four replications the defendant demurred, specially; and he assigned the following causes of demurrer to the replication to the 7th plea:—1st, That the said plaintiff hath not, in or by his said last-mentioned replication in any manner, traversed or denied the matters by the said defendant, in his said 7th plea alleged, nor confessed and avoided the same. 2dly,—That the said last-mentioned replication, although it professes to answer the said 7th plea, of the said defendant, is in truth no answer thereto. 3dly,—That it is not stated or alleged, nor does it appear, in or by the said last-mentioned replication, that the said plaintiff gave the said *John Smith* three months' notice in

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thereon, reciting the proceedings in the former action, or so much thereof as to make it appear that the judgment is warranted by the statute (*post*, 496 n.). The writ then suggests the further breaches; and the same proceedings are to be pursued under the *sci. fa.* as in the original action. But it is not necessary there should be any other judgment than the usual one in *sci. fa.* of an award of execution; and as the statute stays proceedings, upon payment of the damages, costs, and charges, it should seem the plaintiff is entitled to costs on the *sci. fa.*, whether the defendant pleads to it, or not, notwithstanding the third section of the same statute only gives costs in *sci. fa.*, where the plaintiff obtains an award of execution after plea pleaded, or demurrer joined.


(a) As to the damages upon a covenant to replace stock, see *M^r Arthur v. Lord Seyforth*, 2 Taunt. 257; *Shepherd v. Johnson*, 2 East, 211; but see *Harrison v. Harrison*, 1 C. & P. 412.

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writing, to transfer to, and replace in, the name of the said plaintiff, in the books of, &c., said sum of 900*l.*, 3 per cent. Reduced Annuities, with the dividends *which would have accrued due (a)* upon the same, from the date of said supposed writing obligatory. 4thly, That it is not stated or alleged, nor does it appear, in or by the said last mentioned replication, that plaintiff gave said John Smith three months' notice in writing to pay him the dividends *which would have accrued due* upon the said sum of 900*l.* 3 per cent. Reduced Annuities, from the day of the date of the said supposed writing obligatory. 5thly,—That it is not stated or alleged, nor does it appear, in or by the said last mentioned replication, that said plaintiff gave to said John Smith, such notice as in the said condition is in that behalf mentioned. 6thly,—That it is not stated or alleged, nor does it appear, in or by the said last mentioned replication, that the said plaintiff gave such notice as in the said condition of the said supposed writing obligatory, is in that behalf mentioned. 7thly,—That it is not stated or alleged, nor does it appear, in or by the said last-mentioned replication, or breach of the said condition of the said writing obligatory therein assigned, that any, or what dividends had accrued due upon the said sum of 900*l.* three per cent. Reduced Annuities, from said 5th day of November, 1818, being the day of the date of the said supposed writing obligatory. 8thly,—That the said last mentioned replication, and the breach therein assigned, are argumentative, and contain a *negative* pregnant, in alleging that the said John Smith did not, nor would not, transfer to, or replace in, the name of the plaintiff, in the books of, &c., the sum of 900*l.* 3 per cent. Reduced

(a) Where a breach is assigned in neglecting to replace stock, and also in non-payment of accruing dividends, and damages are assessed upon both breaches, the plaintiff cannot maintain a *sci. fa.* for the non-payment of subsequent divi-

dends, accruing between the first judgment and the actual payment of the damages assessed. *Savile v. Jackson*, 1 McClell. 377. As to the measure of damages, in an action for not replacing stock on a particular day, *vide ante*, 491 (a).

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Annuities, with, all, or any of the dividends *which had accrued due upon* the same, from the date of the said writing obligatory, without averring, that any, and what, dividends had accrued due upon said sum of 900*l.* 3 per cent. Reduced Annuities, from the date of the said supposed writing obligatory; and by the omission of which averment, defendant is prevented from traversing and putting the same in issue. 9thly,—That it is stated and alleged, in and by the last mentioned replication, that plaintiff gave to the said *John Smith*, a certain notice in writing, and thereby, required the said *John Smith*, at the expiration of three months from the date thereof (that is to say) of the said notice to transfer to, and replace in, the name of the plaintiff, in the books of the governor and company of the Bank of England, the said sum of 900*l.* 3 per cent. Reduced Annuities, with all the dividends which had accrued due on the same, from the fifth day of November, 1818, being the day of the date of the supposed writing obligatory. Whereas it appears in, and by the same replication, that no dividends whatever could have accrued due on the said sum of 900*l.* 3 per cent. Reduced Annuities, after the said 5th day of November, 1818. The defendant also demurred to the replication to the 8th, 9th, and 10th pleas. The causes of demurrer to the replication to the 8th plea, were the same, as those stated with reference to the replication to the 7th plea. The 1st, 2nd, 3rd, 4th, and 5th causes of demurrer to the replication to the 9th plea, were the same as the 3rd, 4th, 7th, 8th, and 9th causes of demurrer to the replication to the 7th plea. The 6th cause of demurrer to the replication to the 9th plea, was, “that plaintiff hath assigned a breach of the said condition, as part of the said last-mentioned replication, which is complete without.” 7thly,—That the said plaintiff, having traversed and denied the matters in the said 9th plea alleged, ought to have concluded to the country, and not to have alleged other and new matters therein, and

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writing, to transfer to, and replace in, the name of the said plaintiff, in the books of, &c., said sum of 900*l.*, 3 per cent. Reduced Annuities, with the dividends *which would have accrued* due (a) upon the same, from the date of said supposed writing obligatory. 4thly, That it is not stated or alleged, nor does it appear, in or by the said last mentioned replication, that plaintiff gave said John Smith three months' notice in writing to pay him the dividends *which would have accrued* due upon the said sum of 900*l.* 3 per cent. Reduced Annuities, from the day of the date of the said supposed writing obligatory. 5thly,—That it is not stated or alleged, nor does it appear, in or by the said last mentioned replication, that said plaintiff gave to said John Smith, such notice as in the said condition is in that behalf mentioned. 6thly,—That it is not stated or alleged, nor does it appear, in or by the said last mentioned replication, that the said plaintiff gave such notice as in the said condition of the said supposed writing obligatory, is in that behalf mentioned. 7thly,—That it is not stated or alleged, nor does it appear, in or by the said last-mentioned replication, or breach of the said condition of the said writing obligatory therein assigned, that any, or what dividends had accrued due upon the said sum of 900*l.* three per cent. Reduced Annuities, from said 5th day of November, 1818, being the day of the date of the said supposed writing obligatory. 8thly,—That the said last mentioned replication, and the breach therein assigned, are argumentative, and contain a *negative* pregnant, in alleging that the said John Smith did not, nor would not, transfer to, or replace in, the name of the plaintiff, in the books of, &c., the sum of 900*l.* 3 per cent. Reduced

(a) Where a breach is assigned in neglecting to replace stock, and also in non-payment of accruing dividends, and damages are assessed upon both breaches, the plaintiff cannot maintain a *sci. fa.* for the non-payment of subsequent divi-

den, accruing between the first judgment and the actual payment of the damages assessed. *Savile v. Jackson*, 1 M'Clel. 977. As to the measure of damages, in an action for not replacing stock on a particular day, *vide ante*, 491 (a).

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Annuities, with all, or any of the dividends *which had accrued due upon* the same, from the date of the said writing obligatory, without averring that any, and what, dividends had accrued due upon said sum of 900*l.* 3 per cent. Reduced Annuities, from the date of the said supposed writing obligatory; and by the omission of which averment, defendant is prevented from traversing and putting the same in issue. 9thly,—That it is stated and alleged, in and by the last mentioned replication, that plaintiff gave to the said *John Smith*, a certain notice in writing, and thereby required the said *John Smith*, at the expiration of three months from the date thereof (that is to say) of the said notice to transfer to, and replace in, the name of the plaintiff, in the books of the governor and company of the Bank of England, the said sum of 900*l.* 3 per cent. Reduced Annuities, with all the dividends which had accrued due on the same, from the fifth day of November, 1818, being the day of the date of the supposed writing obligatory. Whereas it appears in, and by the same replication, that no dividends whatever could have accrued due on the said sum of 900*l.* 3 per cent. Reduced Annuities, after the said 5th day of November, 1818. The defendant also demurred to the replication to the 8th, 9th, and 10th pleas. The causes of demurrer to the replication to the 8th plea, were the same as those stated with reference to the replication to the 7th plea. The 1st, 2nd, 3rd, 4th, and 5th causes of demurrer to the replication to the 9th plea, were the same as the 3rd, 4th, 7th, 8th, and 9th causes of demurrer to the replication to the 7th plea. The 6th cause of demurrer to the replication to the 9th plea, was, “that plaintiff hath assigned a breach of the said condition, as part of the said last-mentioned replication, which is complete without.” 7thly,—That the said plaintiff, having traversed and denied the matters in the said 9th plea alleged, ought to have concluded to the country, and not to have alleged other and new matters therein; and

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concluded with a verification (a). 8thly,—That the said plaintiff, in and by his said last-mentioned replication, ought to have taken issue on the matters in the said 9th plea alleged, and to have entered a distinct and separate assignment of the said supposed breach of the said supposed writing obligatory, and not to have incorporated such issue and assignment in one and the same replication. Similar causes of demurrer to the replication to the 10th plea.—Joinder in demurrer.

Platt, in support of the demurrers. The 7th plea states, that no notice was given to replace the stock with the dividends, *which would have become due* after the 8th November. The answer to that in the replication is, that the plaintiff did give notice in writing to the said *John Smith*, to transfer the said stock, with all dividends, *which had become due*. This being the case of a surety, the plaintiff must bring himself within the terms of the condition. Now the obligor could not comply with the condition, unless he transferred in the manner pointed out by the plea. [*Bayley J.* He does not desire you to transfer so much as you are bound to transfer.] If issue were taken on the replication, it would be a departure, or if not a departure, the defendant must have re-asserted what he had said before. *De La Rue v. Stewart (b)*, is an authority to shew that no breach ought to have been assigned in this replication. [*Littledale J.* Had you demurred to the 7th plea for duplicity, it would rather appear to me that the plaintiff ought not to have introduced breaches. There might have been a conclusion to the court in respect to the special notice. *Bayley J.* Should you not have assigned duplicity as a special cause of demurrer? You say that there was no notice going far enough; they say there was a notice going nearly to all. *Littledale J.* If no breach had been assigned, could you have maintained the first special cause of demurrer? I am assuming that their notice was

(a) *Calvert v. Gordon*, post, 498.

(b) 2 N. R. 362.

sufficient, and that no breach had been assigned. *Bayley, J.* Suppose the replication had set out a notice in the form stated in the plea, and had concluded to the Court, could you have supported your cause of demurrer? They ought to have concluded to the country; and suggested the breach. The whole of the replication must be taken together. The defendant is entitled to consider it in the same manner, as if the breach had been assigned in the declaration, and the plea had been as here. The 7th cause of demurrer is supported by the case of *Serra v. Fyffe* (a), where the bond declared on was conditioned that *A. B.* should deliver a true account of all moneys received by him as collector of poors' rates; and the defendant having pleaded performance generally, the replication assigned for breach, that *A. B.* was requested to deliver a true account of all moneys received by him in pursuance of his office, but refused to do so. The breach was held to be badly assigned, because it omitted to state that any money had been received. So here it cannot be seen upon the replication, that the dividend had become due. [*Bayley, J.* Your plea of want of notice admits the breach. *Littledale, J.* You were not injured, because the jury are to try the truth of the breaches. I consider the breach no part of the pleadings]. It must be taken altogether. The plaintiff relies upon the whole replication to support the action. [*Littledale, J.* The plaintiff was justified in relying upon it as supporting his action; because you have not denied it.] In *Serra v. Fyffe*, the defect was, that it was not alleged that the money had become due. [*Littledale, J.* In *Serra v. Fyffe*, it was uncertain whether any thing would become due. *Bayley, J.* Here the Court takes notice of it.] If notice had been given before it became due, such notice would have been insufficient. [*Bayley, J.* Where an award is to be made on or before the 1st of April, an allegation that it was made on the 29th of March, is sufficient.] Suppose

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(a) 1 *Marsh.* 441; S. C. by the name of *Serra v. Wright*, 6 *Taunt.* 45.

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the day not material, the notice would be to replace dividends, if any. In *Serra v. Fyffe*, the 2d plea stated a demand of an amount of money received, which implies that something had been received; and though the Court may take notice of the account of the dividends, it may be necessary for the plaintiff to aver it. [*Littlehale, J.* I do not see why, under this notice, you must not replace an instalment due. Are they bound to give special notice? They may be contented with that notice, and it is for your benefit if they recover no more. The notice is good. I doubt whether your plea is good. *Bayley, J.* You construe the plea to apply to the dividends which should accrue before the re-transfer. I thought the objection had been, that it was impossible to replace the dividends. The objection to the breach, should have been assigned as special cause of demurrer.]

Judgment for the plaintiff (a).

Alderson was to have argued against the demurrers.

(a) To a declaration on a judgment in debt on bond, the defendant cannot plead that the bond was conditioned for the performance of covenants, and that no breaches of covenant were suggested or assigned in the original action, as the statute requires. A demurrer to such a plea standing in the common paper, on the 26th November 1821, *Tindal*, for the defendant, applied to *Best, J.*, to direct that the case might stand for argument; but upon the Court, being full, his Lordship said that he had consulted the other judges, who were of opinion there was no ground for such a plea. Ed. MSS. Where a writ of inquiry is executed after judgment by confession, *nil dicit*, or on demurrer, the statute does not direct any judgment to be entered for the damages assessed and for the costs, upon the return of the inquisition. There

can therefore be only one judgment, viz., the old judgment for the penalty, one shilling damages for the detention, forty shillings costs, together with the costs of increase. A second judgment, for the damages assessed on the inquiry was reversed. *Johnes v. Johnes*, Dom. Proc. 3 Dow, 1. The proper course is to make an entry, in the nature of an interlocutory judgment on the demurrer, viz., that the plaintiff *ought* to recover his debt; then to award an inquiry returnable after the next assizes, (though thereby more than one term may elapse between the teste and the return); and upon the return, to enter up final judgment that the plaintiff *do* recover his said debt with nominal damages, and taxed costs, without noticing in the judgment the damages assessed, *Ibid.* And as to the length of the return, *vide ante*, 319.

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l. c. 7 B. C.
DEBT on bond.—Upon *oyer*, the condition, after reciting that the obligees carried on the business of a brewer in copartnership with four other persons, under the firm of *Felix Calvert* and Co., and that the firm had agreed to take the testator's co-obligor, *Richard Edwards*, into their service, as a collecting clerk, was, that *R. Edwards*, from time to time, and at all times during his continuance in the service and employ of the persons for the time being carrying on the business then carried on under the said firm of *F. C.* and Co., should well and truly account for, pay, deliver and make good unto them, some or one of them, immediately after the receipt thereof respectively, all such cash, &c. of or belonging to the persons for the time being carrying on, &c., any or either of them, any or either of their executors or administrators, or to any person or persons to whom they, or any or either of them, should or might be answerable or accountable, and which should be collected or come to the hands, custody or power of the said *R. Edwards* during such his service or employ, and should in all other respects, during his continuance in the service of the persons for the time being carrying on, &c., faithfully perform all other services wherein he should be employed by them; and that the obligors, or one of them, their or one of their heirs, &c., should, from time to time, and at all times thereafter, save harmless, &c. the persons for the time being carrying on the said trade, their heirs, &c., respectively, of, from and against all loss, &c., by reason or on account of any act, &c. to be done or omitted to be done by the said *R. Edwards*, as such clerk, as aforesaid, or in anywise relating to the services in which he should be employed. The defendant then pleaded, that from and after the execution of the said supposed writing obligatory, and in the lifetime of the testator, to wit, on, &c., at, &c., the said *R. Edwards* entered and was

Obligor of a bond conditioned for the faithful service of *A.* whilst in the employ of *B.* cannot discharge himself by giving notice that after a certain period he will be no longer answerable; nor can the personal representative of the obligor discharge himself by such notice. If a plea to a declaration on such a bond states that the principal duly accounted, and the replication alleges the receipt of several sums for which he did not account, and the rejoinder states that these sums were received from *C. D.* and *E.* and that *A.* did not account; a sur-rejoinder, alleging that the moneys stated in the replication are other and different from those specified in the rejoinder, and concluding to the country,—is good.

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received into the service of the said plaintiffs, and of their said copartners, then carrying on the business of a brewer, under the firm, &c., as a collecting clerk in their said business of a brewer, in the said condition mentioned. And that he the said *R. Edwards* remained and continued in their said service, as such collecting clerk, from the said second day of May, 1820, until a certain other day, to wit, until the thirty-first day of October, 1821, on which last mentioned day and year the said testator died, and continually from thenceforth, until and at the time of the giving of the notice by the said defendant herein-after-mentioned, to wit, at London, aforesaid. And the said defendant, in fact, further saith, that the said *R. Edwards* did at all times during his said last mentioned continuance in the service and employ of the plaintiffs, and of the other persons for the time being carrying on the business of a brewer as aforesaid, under the firm aforesaid, before the death of the said testator, well and truly account for, pay, deliver, and make good unto the said plaintiffs, and the other persons, for the time being so carrying on the business of a brewer under the firm aforesaid, immediately after the receipt thereof respectively, all cash, sum and sums of money, bills of exchange, promissory notes and other securities for money, goods and effects whatsoever, of and belonging to them, or any or either of them, or to any person or persons to whom the said plaintiffs, and the other persons, so for the time being carrying on the said business of a brewer as aforesaid, under the firm aforesaid, were answerable or accountable, which were collected or came to the hands, custody or power of the said *R. Edwards* during such his continuance in such service and employ as last aforesaid; and that he, the said *R. Edwards*, did in all other respects, during such his continuance in such service and employ of the said plaintiffs, and of the other persons so for the time being carrying on, &c., faithfully perform all other services wherein he, the said *R. Edwards*, was employed by them, to wit, at, &c. And the said defendant further saith, that the said

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R. Edwards, and the said testator, in his lifetime, and the said defendant, executrix as aforesaid, since his death, and the said *Samuel Kent*, (another obligor,) in the said condition of the said supposed writing obligatory mentioned, did, from time to time, and at all times after the making of the said supposed writing obligatory, save harmless and keep indemnified the said plaintiffs, and the persons for the time being carrying on, &c. of, from and against all loss, costs, suits, actions, claims and demands to which the said plaintiffs and such other persons, or any of them, respectively, were subject or liable, or were put unto by reason or on account of any act, matter or thing done or omitted to be done by the said *R. Edwards* as such clerk as aforesaid, during the time of such his continuance in such service and employ as last aforesaid, or in anywise relating to the services in which he was employed during that time. And the said defendant, in fact, further saith, that within a short and reasonable time in this behalf after the death of the said testator, and before the committing or happening of any breach of the said condition of the said supposed writing obligatory, to wit, on the 31st of October, 1821, at, &c., she, the said defendant, as executrix of the said testator, gave notice in writing to the said plaintiffs, that she, the said defendant, would not remain surety to, or guarantee or indemnify the said plaintiffs, or the other persons for the time being carrying on, &c., for the fidelity of or true and faithful performance by the said *R. Edwards* of his said duties as such collecting clerk, in the said condition mentioned; and so the said defendant saith, that if the aforesaid plaintiffs, and the other persons for the time being carrying on, &c., or any or either of them, have been at all damnified by reason or means, or on account of any matter, cause, or thing in the said condition of the said writing obligatory mentioned, since the giving of such notice by her as aforesaid, the said plaintiffs, and such other persons, as aforesaid, have been so damnified by their own voluntary act, and of their own wrong, and by and

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through their own means and default, to wit, at, &c. Verification, and prayer of judgment. Replication, *precludi non*; because *protesting that the said defendant did not give notice to the said plaintiffs in manner and form as the said defendant has above in her plea in that behalf alleged (a)*. Nevertheless for replication in this behalf the said plaintiffs say, that after the making of the said writing obligatory, and before the day of exhibiting the bill of the said plaintiffs in this suit, that is to say, on the said 2d day of May, 1820, the said *R. Edwards* entered into the service of the said plaintiffs, and of, &c., as their collecting clerk; in their said business of a brewer, as in the said plea is alleged, and remained and continued in the service and employ of the said plaintiffs, and of the persons for the time being carrying on, &c., as such collecting clerk as aforesaid, from the said 2d day of May, 1820, until a certain other day, to wit, until the 16th day of May, 1826, on which last mentioned day the said *R. Edwards* died; and the said plaintiffs say that after the said *R. Edwards* entered into the said service and employ, and during the time that he so remained and continued in the said service and employ, and before the exhibiting of the said bill of the said plaintiffs, and before the time of the said supposed notice, to wit, on the said 2d day of May, 1820, and on divers other days and times between that day and the said 31st day of October, 1821, and

(a) The legal effect of a *protestation* is so different from what the words seem to import, and from the sense in which they are frequently understood by persons not acquainted with the form of pleading, that it may not be improper to state that the above words in italics are to be understood thus: "Admitting, for the purpose of the present action, and in order to entitle the said plaintiff to attack some other part of the defendant's plea, that the defendant *did give notice to the said plaintiffs in manner and form as the said defendant has above in the said plea in that behalf alleged, but protesting against this admission being used against them, the plaintiffs, on any other occasion, and reserving to them the right to say on such other occasion that the said defendant did not give notice to the said plaintiffs in manner and form as the said defendant as above in her said plea in that behalf alleged,*" &c.

during the time that the said *R. Edwards* continued as such collecting clerk as aforesaid, in the said service and employ of the persons for the time being carrying on, &c. divers sums of money were collected by and came to the hands of the said *R. Edwards*, as such collecting clerk as aforesaid, of and belonging to the said persons for the time being carrying on, &c. Yet the said *R. Edwards* did not from time to time, or at any time, well and truly account for, pay, deliver or make good unto the said plaintiffs, or to the other persons for the time being carrying on, &c., or to any or either of them, the said sums of money so collected by him as aforesaid, or any part thereof, although often requested so to do, but wholly neglected so to do; and the said sums of money so had and received by the said *R. Edwards* as aforesaid are still wholly unpaid and unsatisfied, contrary to the form and effect of the said condition of the said writing obligatory, to wit, at, &c. The replication then went on to assign a second breach, that after the time of the said supposed notice of the said defendant in her said plea mentioned, and before the day of exhibiting, &c., and whilst the said *R. Edwards* was in the said service and employ as such collecting clerk as aforesaid, to wit, on the 1st day of November, 1821, and on divers other days and times between that day and the said 16th day of May, 1826, divers other sums of money of and belonging to the persons for the time being carrying on, &c., amounting to a large sum, to wit, 2000*l.* were collected by and came to the hands of the said *R. Edwards*; yet the said *R. Edwards* did not from time to time, or at any time, well and truly account for, pay, deliver over or make good the said last mentioned sum of money, or any part thereof, unto the persons for the time being carrying on, &c., or any or either of them, although often requested so to do, but wholly neglected and omitted so to do; whereby the persons for the time being carrying on, &c., have lost and been deprived of the last mentioned sum of money. And the said plaintiffs say, that neither testator in his life time,

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nor the said defendant since his death, have nor hath either of them, nor hath the said *R. Edwards*, nor the said *S. Kent*, their or either of their heirs, &c., indemnified the persons for the time being carrying on, &c., or any or either of them, or any or either of their heirs, &c., from the said loss so occasioned by the said *R. Edwards* so omitting to account as aforesaid, but have wholly neglected so to do, contrary to the condition of the said writing obligatory. Verification and prayer of judgment.

Rejoinder.—And the said defendant; to so much of the said plea of the said plaintiffs, by them above in reply pleaded, as relates to the said sums of money therein first mentioned to have been collected by and to have come to the hands of the said *R. Edwards*, as such collecting clerk as aforesaid, says, that the same sums were three several sums of money, to wit, one of them being a large sum of money, to wit, the sum of 1000*l.*, part of those sums, was a sum of money which at the said time, when, &c. in the said replication in that behalf mentioned, at London aforesaid, was collected by and came to the hands of the said *R. Edwards*, as such collecting clerk as aforesaid, from one *Christopher Gapp*. (The rejoinder then goes on to allege the receipt of the two other sums.) And that the said *R. Edwards* in his lifetime, within a reasonable time afterwards, to wit, on the 20th day of May, 1826, at &c. did well and truly account for, pay, deliver and make good the same three sums of money unto the said persons for the time being carrying on, &c. according to the form and effect of the said condition. Verification and prayer of judgment. Similar rejoinder to the second breach assigned in the replication, but setting out the receipt of three other sums. Sur-rejoinder.—As to the first part of rejoinder, *precludi non*, because they say, that although true it is that the said three several sums of money in that behalf mentioned in the said rejoinder were collected by and came to the hands of the said *R. Edwards*, as such collecting clerk as aforesaid, and that the said *R. Edwards* did well and

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truly account for, pay, deliver and make good the same three last mentioned sums of money, in manner and form as in the said rejoinder in that behalf above alleged ; yet, for sur-rejoinder in this behalf, the said plaintiffs say, that the said three last mentioned sums of money were not, nor was, nor are, nor is any or either of them, the same identical sums as in the said replication of the said plaintiffs first above are mentioned, but are other and different sums than in the said replication first mentioned, and in respect whereof the said plaintiffs have first assigned the said breach of the said condition of the said supposed writing obligatory, for that the said plaintiffs have assigned the said breach of the said condition first assigned ; for that after the said *R. Edwards* entered into and during the time that he was in the said service and employ, and before the exhibiting of the said bill of the said plaintiffs, and before the time of the said supposed notice, to wit, on the said 2d day of May, 1820, and on divers other days and times between that day and the said 31st day of October, 1821, divers sums of money, other and different than the said three several sums in the said rejoinder of the said defendant first alleged to have been received and accounted for by the said *R. Edwards*, which said other and different sums of money amounted to a large sum of money, to wit, 2000*l.*, and were collected by and came to the hands of the said *R. Edwards* as such collecting clerk as aforesaid, of and belonging to the said persons for the time being carrying on the said business of a brewer, so carried on under the said firm as aforesaid ; yet the said *R. Edwards* did not, from time to time, or at any time, well and truly account for, pay, deliver or make good unto the said plaintiffs, or to the other persons for the time being carrying on the said business, so carried on, &c. or to any or either of them, the said last mentioned sums of money, so collected by him as last aforesaid, or any part thereof, although often requested so to do ; and the said last mentioned sums, so collected by the said *R. Edwards* as aforesaid, are and each

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of them is still wholly unpaid and unsatisfied, contrary to the form and effect of the said condition of the said writing obligatory, to wit, at &c., and which last mentioned sums, so mentioned and set forth in the said breach of the said condition first above assigned by the said plaintiffs, in their said replication, are, and each and every of them is other and different than the said three several sums of money, and each and every of them in that behalf mentioned, in that part of the said rejoinder of the said defendant by her above pleaded to the said breach of the said condition first above assigned in the said replication. *And this the plaintiffs pray may be inquired of by the country.* Similar sur-rejoinder to the second branch of the rejoinder, *mutatis mutandis.*

To this sur-rejoinder the defendant demurred, assigning for cause, that the plaintiffs have thereby concluded to the country, notwithstanding that they have introduced and inserted new matter, that is to say, that divers sums of money, other than and different from the said three several sums in the said rejoinder first alleged to have been received and accounted for by the said *R. Edwards*, which said other and different sums of money are therein alleged, by the said plaintiffs, to have amounted to a large sum of money, to wit, 2000*l.*, and to have been collected by and to have come to the hands of the said *R. Edwards* as such collecting clerk as aforesaid, of and belonging to the said persons for the time being carrying on, &c.; and that the said *R. Edwards* did not, from time to time, or at any time, well and truly account for, pay, deliver or make good unto the said plaintiffs, or to the other persons for the time being carrying on, &c. or to any or either of them, the said last mentioned sums of money, so collected by him as last aforesaid, or any part thereof, although often requested so to do, and that the said last mentioned sums, so collected by the said *R. Edwards* as aforesaid, are, and each of them is, still wholly unpaid and unsatisfied; and that the said plaintiffs, by so concluding to the country as in that behalf

as aforesaid, have wholly prevented and hindered the said defendant from pleading or shewing that the said *R. Edwards* did, from time to time, well and truly account for, pay, deliver or make good unto the said plaintiffs, or to the other persons for the time being carrying on, &c. or to some one or more of them, the said last mentioned sums of money; and also for that the said plaintiffs ought to have concluded the same part of the said plea of the said plaintiffs; by them above in sur-rejoining pleaded, with a verification, instead of concluding the same to the country, as they have done; and also for that the said plaintiffs have, by the same part of their said plea, newly assigned other and different sums of money from those in the said rejoinder of the said defendant first above alleged, yet the said plaintiffs have concluded the same part of their said plea to the country, instead of concluding the same with a verification, as they ought to have done, and have thereby wholly prevented and hindered the said defendant from answering the same; and also for that the said plaintiffs have not in or by the same part of their same plea, or in any manner whatsoever, shewn or alleged, nor doth it in any manner above appear from whom the said other and different sums therein mentioned, or any of them, were or was received by the said *R. Edwards*, nor how many such other and different sums there were, nor doth it thereby appear how the said defendant can learn, discover or ascertain from whom the same, or any of them, were received by the said *R. Edwards*, or how many such sums there were, or how the said defendant is to answer or defend herself against or by reason of such unknown sums, alleged to have been received, without stating or shewing from whom. Joinder in demurrer.

Bayly, in support of the demurrer. Two breaches are assigned by the plaintiffs; one on that part of the condition which requires *R. Edwards* to account for all moneys received by him during his employment; the other for not rendering such account after notice. [*Bayley*, J. It is the

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common course to assign a breach of the condition by non-payment generally (a). You must contend that a surety may discharge himself at any time.] This action is not brought against the living surety. The plaintiff has thought proper to sue the representative of the deceased obligor. *Brigstock v. Stanion* (b) shews that a precise breach must be alleged. *Austin v. Jervis* (c). So the cases collected in Com. Dig. Pleader, E. 5. and Latch, 16 (d), *Rowe v. Roach* (e), *Long v. Jackson* (f), *Filewood v. Popplewell* (g), *Chandler v. Roberts* (h), *Cornwallis v. Savery* (i). [Bayley, J. You must either confess and avoid, or traverse. Here you do not confess the whole breach. According to this mode of pleading the defendant might go on in *infinitum*.] The plaintiffs are the only persons who have the opportunity of knowing what has been received. [Bayley, J. You may not know what sums are received. *Holroyd, J.* It is for you to show the whole amount.] In *Cornwallis v. Savery* it was held, that in assigning a breach, you are bound to conclude to the Court. [Littledale, J. The correct way would have been to take issue upon the first breach only. You say they ought to have concluded with a verification. You have an opportunity of contesting the truth of the breach assigned under the conclusion to the country. There was no necessity for giving the defendant a second opportunity of denying either part.] If the plaintiff is answered only in part, he should have taken judgment for the residue. [Littledale, J. The fault of the defendant's plea does not consist in answering only a part. You take upon yourself to say, that the breach assigned is confined to six sums. *Holroyd, J.* A party is not allowed to plead specially matter which is capable of being given in evidence, where it is not doubtful matter of

(a) 2 Burr. 772.

(b) 1 Ld. Raym. 106.

(c) Hobart, 69.

(d) *Wilkinson's case*.

(e) 1 M. & S. 304.

(f) 2 Wils. 8.

(g) Ibid. 61.

(h) Dougl. 58.

(i) 2 Burr. 772. And see 1 Wms. Saund. 116, n.; 2 Wms. Saund. 410, n.; Ibid. 411; *Willcocks v. Nichols*, 1 Price, 109.

law (a). This objection applies also to the subsequent pleadings.] By assigning a breach in the replication, the plaintiff passes by the bar, and might stand upon the breach assigned. The plaintiff cannot have judgment without a breach, though the plea should be bad. [*Littledale, J.* Suppose that in the sur-rejoinder the plaintiff had said, that the sums mentioned in the rejoinder were not the same as those alleged in the replication; the conclusion to the country would then have been proper. That is the sur-rejoinder in substance; it is merely an amplification. Departure is only ground of special demurrer.]

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Chilton, contra, was stopped by the Court.

BAYLEY, J.—I have no doubt as to the validity of the sur-rejoinder; I have a strong opinion as to the plea. The plaintiff was not bound to set out from whom received. *Shum v. Farrington* (b), *Bath v. Webb* (c). Though the party is surety, or executor of surety, the question is to be considered in the same manner as if he were a principal. The sur-rejoinder does not allege new matter. It merely denies one of the allegations in the rejoinder. If it had concluded with a verification, defendant, in his rebutter, might have said, if you are not suing in respect of these sums received of C. B. and M., then I say the sums were received of three other persons; and so he might go through the London Directory. The common and old answer to a replication of this kind is, to allege payment, and conclude to the country.

HOLROYD, J.—The regular way of rejoining would have been to allege that he duly accounted for these sums. The difficulty has arisen from departing from the old form. This is not like a new assignment in trespass, as I at first thought. If the sur-rejoinder is not good, the rejoinder is bad. The

(a) See *Maggs v. Ames*, 1 Mo. & Payne, 294.

(b) 1 B. & P. 640. And see 8 T. R. 463.

(c) 8 T. R. 459.

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plaintiff may take issue on either of these allegations, the defendant might have answered either sum by rejoinder in the common way. The rejoinder ought not to vary from the common form, to avoid prolixity.

LITTLEDALE, J.—The replication is in the common form. I never saw a rejoinder in this form. If that be correct the sur-rejoinder is correct; though in reality it is only surplusage, and a reiteration of the language of the replication. It does not introduce new matter, as the allegation in effect was already contained in the replication. The defendant might go on thus *in infinitum*. Such a mode of pleading is not to be allowed if it can be avoided. The defendant had the opportunity, in his rejoinder, of specifically answering the matter alleged in the replication.

Judgment for the plaintiffs (a).

(a) And see the opposing dicta of 9 Edw. 4, fo. 15, pl. 10; see also *Catesby and Yelverton*, J. J., Trin. Pasch. 10 Edw. 4, fo. 2, pl. 3.

SOWTER v. DUNSTON and ROBERTS.

The Court will not stay the proceedings on the ground of the pendency of another action, for the same cause, against the defendant jointly with another person, except in a case of oppression or vexation. If such a case is made out, they will interfere in a summary manner, or allow the party to plead in abatement, notwithstanding the four days have expired. *Semble*.

IN Michaelmas Term, 1826, plaintiff commenced an action against *Richards, Moore and Verbeke*, to recover 1000*l.* for repairing and fitting up a house for the use of a company, intended to be called the *Egis Insurance Company*, in which action the plaintiff gave notice of trial, and the cause was appointed to be tried at the sittings after last Trinity term, but the plaintiff withdrew the record. In or about Michaelmas term, 1826, the same plaintiff commenced another action, for the same cause, against *Dunston*. The latter action came on to be tried at the sittings after last Trinity term, when the plaintiff was nonsuited. In Michaelmas term, 1827, the present action was commenced by the same plaintiff against *Dunston and Roberts*,

upon the same demand as that sought to be recovered in the two former actions. The declaration in this action was delivered in Michaelmas term, 1827, and the usual order for time to plead was obtained, to prevent interlocutory judgment. Upon an affidavit by *Roberts*, disclosing the above facts, and stating that the first and third actions are now pending in this Court for one and the same demand, and that if *Roberts* is liable at all to the demand of the said plaintiff, he is liable jointly with *Dunston*, *Richards*, *Moore*, *Verbeke*, and divers other persons, *Campbell* obtained a rule in the course of last term, calling upon the plaintiff to shew cause why the proceedings in this action should not be stayed.

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Platt now shewed cause, upon an affidavit stating that when the third action was commenced, *Richards* and *Moore* were in France. The defendants could not have pleaded the pendency of the former action in abatement; and in *Bishop v. Powell* (a) it was held, that after suing by common process, the plaintiff might arrest the defendant on bailable process, without first discontinuing the former action. (Here he was stopped by the Court.)

Campbell, in support of the rule. If the first action was discontinued on payment of costs, or if they would now discontinue, they might proceed in the third action. It is admitted that three actions have been brought for the same cause. The plaintiff first brings his action against three. The defendant cannot be in a worse situation than if the second action had never been brought. *Roberts* ought not to be liable to the costs of this action, and also to be liable

(a) 6 T. R. 616. So a party who had been taken under an attachment for his contempt in not obeying the previous process of subpoena, may be held to bail on a *quærnus*, after he has appeared to a *subpœna ad respondendum*. *Lee v. Long*, 11 Wightw. 72. It would perhaps have been otherwise if the defend-

ant had been taken under an attachment for his contempt in not obeying the previous process of subpoena. And see *Davison v. Claxworth*, 1 Chit. Rep. 375, n.

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for contribution to the costs of the first action. The insolvency of the first defendant is no answer to the application.

BAYLEY, J.—If in this case any oppression had been shewn to the Court, they might have come to a different conclusion to that which they are about to pronounce. The regular course is to plead in abatement. We are required to interfere after the cause is at issue. If actions had been needlessly multiplied, we might have done so; but I consider this action as substituted for the others. It would be wrong for both actions to go on. The plaintiff must undertake not to proceed in the former action until this is disposed of.

LITLEDALE, J. (a)—The regular mode is to plead in abatement; and the defendant might have leave to plead in abatement after the four days. This has been allowed in action of trespass against a married woman (b). Then I think the Court ought not to interfere if the plaintiff will undertake not to proceed without the leave of the Court, unless he is forced.

Rule discharged, the plaintiff undertaking not to proceed in the action against *Richards*, *Moore* and *Verbeke*, without leave of the Court, or without being forced on by the defendants.

(a) *Holroyd*, J. was absent.

(b) In *Milner v. Milner*, 3 T. R. 632, Lord *Kenyon* says, "Where such a plea is not merely dilatory, but goes to the merits of the cause, the Court will allow him a longer

time than the four days to offer such a plea, lest the justice of the cause should be precluded, in the same manner that they will permit a tender after a special imparlance."

MARRACK v. ELLIS.

COVENANT.—The declaration stated that by indenture of 23d of September, 1820, plaintiff demised to defendant a certain messuage, tenement, farm and premises, with the appurtenances, situate, &c., *habendum*, to defendant, his executors, &c., from 29th September, then instant, to the full end and term of thirteen years, thence next, &c., at a certain rent, in the said indenture mentioned; and defendant covenanted with plaintiff, (amongst other things,) that he, defendant, would at his own expense provide, sow and harrow in the usual quantity of good clover and other grass seeds, in such part of the demised premises as should be tilled with barley and oats, from time to time during the said term, *and also should and would use and employ on the said demised premises all such dung, straw, soil, compost, ashes and manure as should arise or be made thereon during the said term, and at the end, or sooner determination thereof, should and would leave the same on the said premises for the benefit of the plaintiff, (the reed of wheat and oats only excepted.)* The declaration then sets out three other covenants. Upon all these covenants breaches were assigned. The second breach was as follows: “And the said plaintiff, in fact, says, that the said defendant did not nor would use and employ on the demised premises all such dung, straw, soil, compost, ashes and manure as were or was made thereon during the said term, (other than the reed of wheat and straw,) according to the form and effect of the said indenture in that behalf, but on the contrary thereof, the said defendant since the making of the said indenture, and during the continuance of the said demise, to wit, on the 1st day of October, 1820, and on divers days and times between that day and the day of exhibiting, &c. in the county aforesaid, took and carried away, off and from the demised premises, divers large quantities, to wit, 200 cart loads of straw, (other than the reed of wheat and oats,) 200 cart loads of soil, 200 cart loads of ashes, and

Upon a covenant to use on demised premises all dung, straw, soil, compost, ashes and manure made thereon, a breach is assigned in not using on demised premises all dung, straw, soil, compost, ashes and manure made thereon, but on the contrary thereof, taking away straw, soil, ashes and manure. Plea, that defendant did not take away the said straw, compost, ashes and manure. A verdict being found for the plaintiff upon the supposed insufficiency of the plea, without the production of evidence, the Court refused to enter a nonsuit, or direct a new trial. The proper course seems to be, to enter a verdict for the defendant upon the breach, with an assessment of damages as to the soil, or generally as to the premises in the breach not covered by the plea.

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200 cart loads of manure, which had been, arisen, and made upon the said demised premises during the said term, and spent and consumed the same elsewhere than on the demised premises, contrary to the form and effect of the said indenture, and of the said covenant so made by the said defendant as aforesaid." The declaration contained a second count upon the indenture to the same effect as that set out in the first count, assigning other breaches. *Plea*, 1st, *non sunt facta*; 2dly, issue on first breach; 3dly, as to the second breach *actio non*, because he says that he, the said defendant, did not take and carry away, off and from the demised premises the said straw, (other than the reed of wheat and oats,) *compost*, ashes and manure in that breach mentioned, *modo et formâ*. Issue was taken upon the other breaches, and the replication joined issue upon the pleas. This cause being called on at the last Bodmin Assizes, before *Burrough*, J. (a), it was intimated by the counsel for the plaintiffs to the counsel for the defendant that the plaintiff would be entitled to a nominal verdict, inasmuch as the second breach of covenant assigned was not covered by the plea, the plaintiff having alleged that the defendant had taken and carried away straw, *soil*, ashes and manure, whilst the defendant only denied the taking and carrying away of the said straw, *compost*, ashes and manure. The learned judge being of this opinion, a verdict was taken with 1s. damages, no evidence being given in support of the breaches, and it being conceded that the plaintiff would be entitled to a verdict on the first issue; and the defendant having leave to move for a new trial.

Halcomb in the last term moved for a rule calling upon the plaintiff to shew cause why a nonsuit should not be entered, or a new trial had. Counsel differing as to the form in which the leave had been reserved,

(a) Counsel for the plaintiff, *C. F. Williams* and *Carter*; for the defendant, *Wilde*, Serjeant; and *Halcomb*.

Lord TENTERDEN, C. J.—Soil must mean compost. You may take your rule in the alternative.

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C. F. Williams, and Carter, now shewed cause. There is no pretence for the motion for a nonsuit, the learned judge having reported, as the fact undoubtedly was, that he had not given leave to that purpose (a). No answer has been given to that part of the declaration which charges the defendant with removing soil, except the plea of *non est factum*. If that plea had stood alone, and no evidence had been given on the breaches assigned, there must, upon proof of the execution of the indenture, have been a verdict for nominal damages upon the breaches assigned; and the result must be the same when part of the breach is left uncovered; since, as to that part, nothing but *non est factum* is pleaded. *Everard v. Paterson* (b) is an authority to shew that where the pleas purport to answer the whole action, although they do so imperfectly, the plaintiff cannot sign judgment for the parts which are unanswered.

Manning, and *Halcomb*, contra. The term “soil” must here be taken to be equivalent to “compost or dung.” This is the last definition of the word “soil” given by Johnson, as derived from the verb “to soil,” which owes its origin to the French verb “souiller.” It would be absurd to suppose that the word was here used in the sense in which it is traced by Johnson from the Latin “solum.” The plaintiff was not stipulating that his *land* should not be carried away; but he was providing for something in the nature of manure, which was to arise and be made upon the land. Supposing it to be doubtful upon the indenture whether “soil” and “compost” are to be considered as words of the same, or of a distinct meaning, the defendant has in effect, by his plea, alleged that they have the same

(a) *Ante*, 241, 425.

point, 2 Marsh. 304; *Wilcox v.*

(b) 6 Taunt. 645; and see S. C. *Nexman*, 1 Chit. Rep. 132; 1 Wms. differently reported as to this Saund. 28, n.

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meaning, and the plaintiff has accepted the defendant's construction, by joining issue upon the plea. The word "manure" in the plea is a general term not applying merely to the word manure in the indenture and breach, and which may in the plea mean other species of manure than those before enumerated. It may be admitted, that if the plea of *non est factum* had stood alone the plaintiff might, upon that issue being found for him, have proceeded to assess damages upon the breaches assigned, and that if in addition to the plea of *non est factum* there had been a plea purporting to answer part of the declaration only, the result might have been the same. But here, the special pleas professing to answer the whole declaration, the judge had no power to inquire into the legal sufficiency of the pleas so as to direct an assessment of damages in anticipation of their being found really to answer less than they assumed to answer (a).

BAYLEY, J. The impression upon my mind at present is that soil is not compost; but we should be doing the plaintiff an injustice if we were to direct a nonsuit to be entered, and thereby deprive him of the opportunity of taking the opinion of a court of error. A new trial would be an evil to both parties. The application appears to me to be misconceived (b). The case may be put on a just footing by entering a verdict for the plaintiff on the plea of *non est factum*; for the defendant, on the plea to the second breach; an assessment of damages as to the "soil," or generally, as to the premises in the second breach not covered by the plea; and discharging the jury from finding a verdict upon the other issues.

Rule discharged.

(a) See *Thomas v. Heathorn*, 3 D. & R. 647; 2 B. & C. 477, 480.

(b) It would seem that if in point of law the plea is an answer to the breach, the assessment of damages would be nugatory, and the defendant would be entitled to

tax his costs on the *postea*, and issue execution; and that, on the other hand, if the plea is to be considered as leaving a part of the breach unanswered, the plaintiff would be entitled to the *postea*.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

HILARY TERM,

IN THE EIGHTH AND NINTH YEARS OF THE REIGN OF GEORGE IV.

MEMORANDUM.

IN the course of this Term, Sir *James Scarlett*, Knight, resigned the office of Attorney General to His Majesty, and was succeeded by Sir *Charles Wetherell*, Knight, one of His Majesty's Counsel.

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DAVID WALLACE, THOMAS JACKSON MORTIMER, and
ELIZABETH MAVOR, his Wife, v. M'LAREN.

Upon a lease
by tenants in
common the
survivor may
sue for the
whole rent;
although the
reservation be
to the lessors
according to
their respective
interests.

COVENANT.—The declaration stated, that heretofore, in the life-time of one *Thomas Mortimer*, since deceased, and of one *John Elsworth*, who is also since deceased, and after the intermarriage of the said *Thomas Jackson* and *Elizabeth Mavor* his wife, to wit, on the 10th day of April, A.D. 1815, at, &c. by a certain indenture, then and there made, between the said plaintiffs and the said *Thomas Mortimer* and *John Elsworth*, of the one part, and the said defendant of the other part, (*profert*.) the said plaintiffs and the said *Thomas Mortimer* and *John Elsworth* did demise unto the said defendant certain messuages, &c. *habendum*, unto the said defendant, his executors, &c. from the 25th day of March, then last past, to the full end and term of twenty-one years, then next ensuing, determinable as therein mentioned; yielding and paying, therefore, yearly to the said plaintiffs and the said *Thomas Mortimer* and *John Elsworth*, their heirs, executors, and administrators, according to their several and respective rights and interests therein, the yearly rent of 54*l.* clear, &c. upon the four most usual feasts or days of payment of rent in the year, that is to say, on, &c., by even and equal portions, the first payment thereof to begin and be made on, &c.; and the said defendant did thereby, for himself, his heirs, &c. covenant with the said plaintiffs and the said *Thomas Mortimer* and *John Elsworth*, their heirs, &c. that he, the said defendant, his executors, &c. or some or one of them, should and would, during the continuance of the said indenture, well and truly pay to the said plaintiffs and the said *Thomas Mortimer* and *John Elsworth*, their heirs, executors, &c. according to their several and respective rights and interests therein, the said yearly rent of 54*l.* at the several days and times, and in manner and form therein-before mentioned and appointed for payment thereof; as by the

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said indenture, reference being thereunto had, will, amongst other things, more fully and at large appear. By virtue of which demise the said defendant afterwards, to wit, on the said 10th day of April, in the year aforesaid, entered into and upon the said demised premises, with the appurtenances; and became and was possessed thereof for the said term. Averment, That after the making of the said indenture, and during the said term thereby granted, and after the deaths of the said *Thomas Mortimer* and *John Elsworth*, to wit, on the 29th day of September, A.D. 1827, at Westminster aforesaid, a large sum of money, to wit, 54*l.* of the rent aforesaid, for one year of the said term, ending on the day and year last aforesaid, became and was due and still is in arrear and unpaid to the said plaintiffs, and all which said sum of 54*l.* accrued due after the deaths of the said *Thomas Mortimer* and *John Elsworth* to the said plaintiffs, according to their said several rights and interests; contrary to the tenor and effect, true intent and meaning of the said indenture, and of the covenants of the said defendant, by him, in that behalf, so made as aforesaid, to wit, at Westminster aforesaid, in the county aforesaid, and so the said plaintiffs in fact say, that the said defendant, although often requested so to do, hath not kept the said covenant, &c. To the damage of the said plaintiffs of 200*l.*, and, therefore, they bring their suit, &c. To this declaration the defendant pleaded *non est factum*, and three special pleas, to which the plaintiff demurred.

This case being called on in the common paper as a demurrer to sham pleas,

Archbold, for the defendant (a), stated, that he was instructed to argue that the declaration was insufficient. Being required by the Court, when full, to state his objection, he said, that the rent being made payable to the four lessors, their heirs, &c. according to their several and respective rights and interests, it must be taken that they were (a) The defendant had delivered his demurrer books, as for an argument.

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tenants in common of the property demised, and that consequently the plaintiffs, as survivors, could not sue for the whole rent.

PER CURIAM.—Here the demise is joint; and even supposing the words relied on, to prove that the lessors were tenants in common, it is a well-known rule (*a*) that the action for rent by tenants in common is in its nature a joint action, and consequently the survivors may sue for the whole.

Judgment for the plaintiffs upon the demurrer (*b*).

(*a*) "Also as to actions personal, tenants in common may have such actions personal jointly in all their names, as for trespass, or for offence which affects their tenements in common, as for breaking down their houses, breaking into their closes, feeding, sporting, and treading down their grass, cutting their wood, fishing in their fishery, *et hujusmodi*. In this case tenants in common shall have one action jointly, and shall recover jointly their damages, because the action is in the personality, and not in the realty, &c. Also, if two tenants in common make a lease of their tenements to another for a term of years, rendering to them a certain

yearly rent during the term, if the rent be in arrear, &c., the tenants in common shall have an action of debt against the lessee, and not divers actions, for that the action is in the personality."—*Littleton* Sections, 315, 316. Although the words "rendering to them," used by *Littleton*, may seem to imply a reservation of rent to the lessors jointly, the reason given for considering the action as joint applies equally to a demise where the reservation is several, as in the principal case, which is certainly not stronger than the cases of tort, put by *Littleton* in his 315th section.

(*b*) *Chitty* was to have argued for the plaintiffs.

TUCKER and others, Assignees of HICKMAN, a Bankrupt,
 v. M. H. BARROW, Gent. one, &c.

To support a count on an account stated, there must be an acknowledgment of a subsisting debt.

ASSUMPSIT.—The first count of the declaration was for money lent to the defendant by *Hickman* before his bankruptcy; second count, for money paid, laid out, and expended

Seemle, that a compulsory admission, made before commissioners of bankrupt, is not evidence of an account stated.

by *Hickman*, before his bankruptcy, for plaintiff's use; third count, for money had and received by defendant to the use of *Hickman* before his bankruptcy; fourth count, upon an account stated between defendant and *Hickman* before his bankruptcy. In all these counts the promises were laid to the bankrupt. The fifth count was for money lent and advanced, and paid, laid out and expended by *Hickman* before his bankruptcy, for the use of defendant, and for money had and received by defendant to the use of *Hickman* before his bankruptcy, and for money due from defendant to plaintiff upon the balance of an account stated between defendant and *Hickman*, before the bankruptcy, with a promise to plaintiffs, as assignees; sixth count, upon an account stated between defendant and plaintiffs, as assignees, of money due from defendant to plaintiffs, as assignees. Plea, non-assumpsit; with notice of set-off. At the trial, before Lord Tenterden, C. J. at the adjourned sittings at Guildhall, after last Michaelmas Term (a), the commission of bankrupt against *Hickman*, bearing date 23d May, 1826, was put in; as were also the depositions as to the petitioning creditor's debt, the trading, and act of bankruptcy, which consisted in lying in prison from 30th January, 1826, on which day *Hickman* was rendered in discharge of his bail, in an action at the suit of *S. & N.*, to the time of the commission, being more than twenty-one days (b). To affect defendant with a knowledge of the act of bankruptcy, the bail-piece in that action was put in and proved; by which it appeared defendant was rendered on the 30th January, 1826, "by *Squire for Barrow* (the defendant)," *Squire* being his agent. The examination of defendant of the 5th July, 1826, signed by him, was also put in, proved and read, wherein defendant acknowledged to have received 75*l.* 9*s.* on account of the bankrupt, on the 10th February, 1826, and a sum of 3*l.* 8*s.* 3*d.* owing to the bankrupt from one *F. S.* The assignment

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v.
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(a) Counsel for the plaintiff, *F. Pollock* and *Deacon*; for the defendant, *Brougham*.

(b) 6 *Geo.* 4, c. 16, sect. 5.

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from the commissioners to the plaintiffs was clearly proved. The examination before the commissioners related to the proceeds of certain stock-in-trade which *Hickman* had caused to be sold by auction. The following questions and answers were produced.

Q. Have you received any moneys on account of the bankrupt?

A. Yes. It appears by the auctioneer's account that I have received the sum of 75*l.* 9*s.* on account of the bankrupt.

Q. When was that sum received?

A. I believe about the 10th day of February last.

Q. By whom was it paid to you?

A. The auctioneer, Mr. Samuel Ridley, sent me a draft on Wigney's bank.

Q. Have you any doubt about the sum of 75*l.* 9*s.* being received on the 10th of February last?

A. I believe it was—I have very little doubt; but the draft will shew.

Q. Is the account marked (A) the only account delivered to you by Mr. Ridley, the auctioneer?

A. Yes, it is.

Q. Have you received the proceeds of that draft on Messrs Wigney's?

A. Yes, I have.

Q. When did the bankrupt's affairs become embarrassed?

A. I had no knowledge of his embarrassment until January.

Q. In how many actions were you at that time concerned for the bankrupt wherein he was a defendant?

A. Two; upon bills of exchange.

Q. When did you advise him to tender in those actions?

A. I think somewhere about the 26th January. I do not know I advised him; it was rather an act of his own.

Q. Then you knew at that time that the bankrupt was in insolvent circumstances?

A. Yes, I did.

Under the notice of set-off the defendant gave in evidence his bill of costs against the bankrupt, amounting to 91*l.* 12*s.* 4*d.*; of which 32*l.* 0*s.* 8*d.* was incurred subsequently to the render. He also claimed 56*l.* 13*s.* 2*d.* for advances made to the bankrupt for his subsistence in prison, and for rent, which the defendant had paid after the act of bankruptcy, in pursuance of an undertaking which he had previously given to the bankrupt's landlord. On the part of the defendant it was insisted, that as all the *indebitatus* counts were upon transactions with *Hickman* before his bankruptcy, the evidence did not support the declaration. For the plaintiff it was urged that he was entitled to recover upon the fifth count, inasmuch as any acknowledgment of a debt amounted to an account stated. The learned Judge, however, was of opinion that the evidence merely shewed money received by the defendant to the use of the assignees; and there being no count in the declaration adapted to that liability, he directed a nonsuit, giving the plaintiff leave to move to set the nonsuit aside, and enter a verdict for 78*l.* 15*s.* 3*d.*

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F. Pollock now moved accordingly. The plaintiffs were entitled to a verdict upon the sixth count. The defendant had received the money as the bankrupt's money. If the plaintiffs had relied upon that transaction as money had and received to the use of the bankrupt, they would have been bound by the bankrupt's acts; but the cases will appear to go this length, that wherever an admission is made of a right to recover, it may be given in evidence under the account stated. *Highmore v. Primrose* (a), and *Knowles v. Michel* (b) there cited by Mr. J. Bayley, are authorities to this extent, that whatever is evidence of a debt is evidence on the account stated. Here the defendant admits that he has received the money, and does not pretend that he has applied it. If the defendant had expressly said, "I have received the money to the use of the assignees," that

(a) 5 M. & S. 65.

(b) 13 East, 249.

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acknowledgment would, without question, have been receivable in evidence under the account stated, and his answers amount to such an acknowledgment.

BAYLEY, J.—This case is perfectly distinguishable from those which have been cited. If there had been an acknowledgment of a subsisting debt, it would have been evidence under the account stated: looking at this acknowledgment, the defendant does not admit a subsisting debt.

HOLROYD, J. concurred.

LITLEDALE, J.—I incline to think that an admission on a compulsory examination before commissioners would not be evidence of an account stated. The cases in which an admission has been held to have that effect have been where the admission has been made either to the plaintiff or to some person authorized by him; but here the party is bound to answer, and does not account *voluntarily* (a).

Lord TENTERDEN, C. J.—The utmost effect of the admission is to make a *prima facie* case.

Rule refused.

(a) An infant not having a legal will is not bound by an account stated by him, *Trueman v. Hurst*, 1 T. R. 40, or by his election, *Farbes v. Moffatt*, 18 Ves. 328; *Stalman, Elect. & Satisfact.* 183, 192, 193, 210.

MULLETT v. HUTCHISON.

"I have in my hands three bills which amount to 120*l.* which I have to get discounted or return on demand," requires no stamp.

l. 713 d. 639
ASSUMPSIT. The first count of the declaration stated, that in consideration that plaintiff would indorse and deliver to defendant three bills of exchange, one thereof bearing date, &c. (stating the particulars of the bills, which were for 49*l.* 18*s.* 6*d.*, 54*l.* 5*s.*, and 17*l.* 6*s.*) to be got discounted by him, defendant, for plaintiff; and also in consideration that plaintiff had then and there agreed to pay

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and allow defendant a certain sum of money for interest, or discount, upon the several sums in the said bills specified, at and after the rate of 5*l.* per cent., from the day of defendant's getting the same discounted until the said bills should respectively become due and payable; and also in consideration that plaintiff had then and there agreed to pay and allow defendant 5*l.* per cent. upon the said bills, for defendant's trouble and commission in getting the same discounted, he, defendant, undertook, &c. to get the said bills discounted for plaintiff, or else return the same to plaintiff on demand. Averment, that plaintiff, confiding, &c. did indorse and deliver the said bills to defendant for the purpose aforesaid, and was ready and willing to pay, allow, &c. whereof notice, &c. And although defendant had returned to plaintiff said bills for the payment of said sums of 49*l.* 18*s.* 6*d.* and 54*l.* 5*s.* undiscounted, and although plaintiff did afterwards, to wit, on, &c. at, &c. request defendant to get said bill for 16*l.* 7*s.* discounted for plaintiff, or else to return the same to him; yet defendant did not nor would get any of the said bills discounted for plaintiff, or return said bill for 16*l.* 7*s.* when he was so requested as aforesaid, but hath hitherto wholly refused so to do; and afterwards, to wit, on, &c. at, &c. defendant converted and disposed of said bill for 16*l.* 7*s.* to his own use; by means whereof plaintiff afterwards, to wit, on, &c. at, &c. was arrested in a certain action before then commenced, in the court of, &c. on the said bill, at the suit of one *J. P. T.* as the holder thereof, and was detained in prison at the suit of the said *J. P. T.* for the cause aforesaid, for a long space of time, to wit, &c., and was also then and there called upon and obliged to give unto the said *J. P. T.* a certain cognovit in the said action, for the payment of the said sum of 16*l.* 7*s.*, together with certain interest on the said bills, and certain costs in the said action, amounting, &c., payable in two months from the day and year last aforesaid. The second count omitted all mention of the bills for 49*l.* 18*s.* 6*d.* and 54*l.* 5*s.* The third count stated that in

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consideration plaintiff, at the special instance, &c. had before then indorsed and delivered to defendant a certain bill of exchange, bearing date, &c. drawn, &c. for 16*l*. 7*s*.; to be got discounted by defendant for plaintiff for reward to defendant in that behalf, defendant undertook; &c. to get said last mentioned bill discounted for plaintiff, or else to return the same to plaintiff on demand; and although plaintiff did afterwards, to wit, on, &c. at, &c. request defendant to get the said last mentioned bill discounted for plaintiff, or else return the same to him, yet defendant, not regarding, &c. (Breach, and special damage, as before.) Fourth count; that on, &c. at, &c. in consideration that defendant, at his special instance, &c. had the care and custody of a certain bill of exchange, drawn, &c. bearing date, &c. for the payment of 16*l*. 7*s*. defendant undertook, &c. to take due and proper care thereof, yet defendant, not regarding, &c., did not nor would take due and proper care of the said last mentioned bill, but wholly neglected so to do, so that afterwards, to wit, on, &c. at, &c. the same became and was wholly lost to plaintiff, and in consequence thereof, &c. (Special damage, as before.) At the trial of this cause before Lord Tenterden, C. J. at the adjourned sittings at Guildhall after last Michaelmas term (a), the plaintiff produced the following unstamped paper in the handwriting of the defendant:—“Sir,—I have in my hands three bills, which amount to 120*l*. 10*s*. 6*d*., which I have to get discounted, or return on demand. *John Hutchison*. 6th June, 1826. To Mr. *Mullett*.” On the part of the defendant it was objected, that this paper purported to contain an undertaking or agreement on the part of the defendant, and was therefore not admissible in evidence without an agreement stamp (b).

(a) Counsel for the plaintiff, *Fish*; for the defendant, *F. Kelly*.

(b) By 55 Geo. 3, cap. 184, Sched. Part I. a duty is imposed on any “agreement, or any minute or memorandum of an agreement, where the matter thereof shall be

of the value of 20*l*. or upwards, whether the same shall be only evidence of a contract or obligatory upon the parties from its being a written instrument.” The only evidence to support the undertaking and promise stated in the

For the plaintiff the case of *Tomkins v. Ashby* (a) was cited. The learned judge received the paper in evidence, giving the defendant leave to move to enter a nonsuit; and a verdict was found for the plaintiff, damages, 40*l.*, to be reduced to 20*l.* on the defendant's procuring the cognovit to be given up.

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F. Kelly now moved to enter a nonsuit. This instrument required an agreement stamp, inasmuch as it was produced as the evidence of a contract. This was not the case in *Tomkins v. Ashby* (a), which was cited on the part of the plaintiff. There the words were simply,—“Sept. 24, 1824. Mr. *Tomkins* has left in my hands 200*l.*” The present case is hardly distinguishable from that of *Langdon v. Wilson*, which was moved by Mr. *Campbell* (b). There the words were,—“Mr. *Langdon*,—Sir,—I have this day received a bill of exchange for 500*l.*, drawn by one *Patterson* on *T. Harrison*, bearing an indorsement, and the indorsement of Sir *P. Baghot*, which I hold as your attorney, to recover the value of from the respective parties, or to make such other arrangements for your benefit as may appear to me, in my professional capacity, reasonable and proper.”

p. 2 V.R. 10
no stamp
required.

LORD TENNERDEN, C. J.—If the defendant had said, “I will undertake” to get it discounted or return it on demand, the case would have been very different. All that he says, however, is, “which I have to get discounted, or return on demand.” If the words had been, “I have in my hands three bills to return on demand,” it would have been quite clear; and this is the effect of what he said.

declaration was the unstamped memorandum. Unless therefore this instrument contained an implied promise, it might, perhaps, have been contended that the proof of the contract declared upon was incomplete.

(a) 6 B. & C. 541. That case, however, seems merely to have de-

cided that no instrument requires a receipt stamp which does not operate by way of discharging an existing debt.

(b) In this case a rule nisi was obtained by Mr. *Campbell* for entering a nonsuit; which rule is still depending.

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BAYLEY, J.—The stamp acts are not to be extended to cases which are not manifestly within them. Suppose an attorney gives an acknowledgment of having received certain deeds; that would not require a stamp.

HOLROYD, J.—I incline to think that a stamp was not requisite. The party was not bound to interfere.

LITLEDALE, J. concurred.

Rule refused (a).

(a) And see *Watkins v. Hewlett*, *Rutley, Ryan & Mood*, 13; *Chadwick v. Sills*, *ibid.* 15.
3 J. B. Moore, 211; *Latham v.*

THE KING v. COOK.

Where the expenses of an indictment for a misdemeanour are defrayed by subscription, and the nominal prosecutors incur no expense, they are not entitled to costs, as prosecutors within 5 *W. & M. c.* 11. s. 3.

Whether the near relations of a person whose body has been disinterred for the purposes of dissection, are parties grieved within that statute, *quære*.

THIS defendant, a surgeon, had been convicted of a misdemeanour, in disinterring the body of a female, for the purposes of dissection. He had removed the indictment by *certiorari* from the court of Quarter Sessions into this Court, having previously entered into the recognizance required by the statute 5 *W. & M. c.* 11, s. 2. A rule had been obtained on the part of the prosecutors, who were near relations of the deceased, calling upon the defendant to shew cause why they should not be allowed their costs, under s. 3. of the same statute (a), against which

Coleridge shewed cause, upon an affidavit, stating that the prosecution had been conducted at the joint expense of

(a) Which enacts, "that if the defendant prosecuting any such writ of *certiorari* be convicted of the offence for which he was indicted, then the said Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor,

baillif, constable, headborough, tithingman, churchwarden or overseer of the poor, or any other civil officer, who shall prosecute upon the account of any fact committed or done that concerned him or them, as officer or officers, to prosecute or present."

various inhabitants of the parish in which the offence had been committed; and he contended that there was no ground for the application. It does not appear from any thing before the Court, that the parties in whose names the prosecution has been carried on have really incurred any expense, or even that they are the parties applying for this rule. The benefit conferred by the statute is confined expressly to *prosecutors, being parties grieved*; and even if the Court should think that the relations of the deceased, in whose names this prosecution has been conducted, have been sufficiently made out to be the *prosecutors* within the meaning of the statute, it is still clear, that they have not shewn themselves to be *parties grieved*, so as to be entitled to the benefit of the statute. The only grievance or injury of which they can possibly complain, is that done to their feelings by the disinterment of the body of their deceased relation; but that is not an injury within the meaning of the statute. The statute applies only to persons who have suffered an actual injury; and the offence in this case is a misdemeanour, as being an act *contra bonos mores*, having in its legal effect and construction no reference to the feelings of relations and friends. *Rex v. Incedon (a)* is a decisive authority against this application. It was there laid down, with reference to the prosecutor of an indictment for obstructing a highway, that he must shew himself to be the party grieved (*b*), in order to obtain costs under the statute; and the Court there evinced an inclination to construe the statute strictly.

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Crowder, in support of the rule. The prosecution was evidently carried on by the relations of the deceased, whose names appear as prosecutors; and if they, from their poverty, have been compelled to receive assistance from others, they are still no less the *prosecutors*, in the strict legal sense of the word. Then, that they are *parties grieved*,

(a) 1 M. & S. 268. And see & S. 101; Mann. N. P. Digest, post, 547.

(b) And see *Miles v. Rose*, 4 M.

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within the scope of the act of parliament, there are many clear authorities to shew. In *Rex v. Williamson* (a), the prosecutor of an indictment for stopping up a common footway, who had used it for some years before it was stopped up, was held to be a party grieved within the meaning of the statute. In *Rex v. Dewsnap* (b), persons dwelling near a steam-engine, which was a public nuisance, and prosecuting for it, were held to be parties grieved, and entitled to their costs under the act: and Lord *Ellenborough* there observed, "that though a nuisance may be public, yet that there may be a special grievance arising out of the common cause of injury, which presses more upon particular individuals than upon others not so immediately within the influence of it." In *Rex v. Taunton, St. Mary* (c), several persons were held entitled to costs under the statute, as prosecutors of an indictment for not repairing a highway, one as constable of the manor, the others as parties grieved, they having previously used the way. The general principle pervading these cases is not at all interfered with by the decision in *Rex v. Incledon* (d); because there the costs were refused solely on account of the special circumstances of the case; the application not having been made until after the defendant's recognizance had been discharged, nor until after an interval of two years from his conviction; and the prosecutor having, by his own conduct, shewn that he did not consider himself as a party grieved;

Lord TENTERDEN, C. J.—In order to bring themselves within the statute, the parties making this application must shew clearly, both that they are the prosecutors of the indictment, and that they are parties grieved by the defendant's conduct. It is sworn on the part of this defendant, and not denied on the other side, that the expenses of the prosecution were defrayed by a public subscription, and not by the persons whose names appear as the prosecutors; and that being the case, I think those persons cannot be

(a) 7 T. R. 39.

(b) 16 East, 194.

(c) 3 M. & S. 465.

(d) 1 M. & S. 268.

regarded as the prosecutors within the meaning of the act of parliament. Upon this ground I am of opinion that this rule ought to be discharged.

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The rest of the Court concurred.

Rule discharged.

The KING v. The COMPANY OF PROPRIETORS of the
WORCESTER and BIRMINGHAM CANAL NAVIGATION;
and JOHN HODGKINSON, their Clerk.

MARRYAT had obtained a rule calling on the defendants to shew cause why a writ of *mandamus* should not issue, directed to them, commanding them to make, or cause to be made, in the book kept and provided for that purpose, an entry of the probate of the will of *William Horne*, deceased, in the Consistorial Court of the Lord Bishop of Litchfield and Coventry, and the name and place of abode of *Ann Horne*, as the owner, proprietor, or person entitled to one share in the profits of the said navigation, belonging to the said *William Horne* at the time of his death. The affidavits, upon which the rule was obtained and discussed, set forth, substantially, the following facts: The company were incorporated by an act of parliament; for the purpose of making a canal from, or near to, the town of Birmingham, in the county of Warwick, to communicate with the river Severn, near to the city of Worcester. By the different provisions of that act the company had power to purchase lands for the use of the said navigation and works, and to raise among themselves a sum of money for making and completing the canal, which was to be divided into 1,800 equal shares. These shares were to be deemed personal estate, and to be transmissible as such, and not in the nature of real estate; and they were vested in the several proprietors in proportion to the sums they should subscribe; and the subscribers were to receive,

This Court will grant a *mandamus* to a canal company, to enter upon their books the probate of the will of a deceased shareholder; leaving any question as to the validity and effect of the probate to be raised by a return to the writ.

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after the navigation should be completed, one 1,800th part of the profits that should arise and accrue by virtue of the money raised. The proprietors might sell their shares. The deeds of bargain and sale, or of transfer of shares, were to be delivered to the committee of the company, or their clerk, and to be filed and kept for the use of the company; and an entry thereof was to be made in a book to be kept for that purpose. The clerk of the company was to enter and keep in a proper book, provided for that purpose, a true and perfect account of the names and places of abode of the several proprietors and persons, from time to time, becoming proprietors. The company were empowered to ask, demand, and receive, for their own use, certain rates per ton for every mile, for the tonnage and wharfage of goods carried upon the canal. The canal was made and completed. The office of the company was and is established at Birmingham; the transfers of shares are filed and kept by the clerk of the Company at the office *there*; the dividends are paid *there*; the books of account are kept *there*; and the general business of the canal is *there* transacted. The canal passes through the diocese of Litchfield and Coventry, for the distance of about half a mile; through a peculiar of that diocese, for the distance of about two miles; and through the diocese of Worcester, for the distance of about twenty-seven miles. Rates of tonnage arise, and are collected, in each of those dioceses; but a much greater proportion in the diocese of Worcester than in the diocese of Litchfield and Coventry. *William Horne*, the testator, died at Birmingham. The transfer of his share, he having been a purchaser, was registered in the office of the company at Birmingham. His will was proved by his executrix, *Ann Horne*, in the diocese of the Bishop of Litchfield and Coventry. The Company have been requested to enter in their book the probate of his will, and the name and place of abode of his executrix, as the proprietor of his share, but have refused to do so, contending that the probate in the diocese of Litchfield and Coventry was insufficient, and

that a prerogative probate was necessary; and the question intended to be raised for the consideration of the Court is, whether the will of a deceased proprietor of a share in the canal does or does not require a prerogative probate, in order to entitle his executrix to have the probate of the will, and her name as a proprietor, entered in the Company's book.

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Holroyd shewed cause against the rule. A prerogative probate was necessary. The profits arising from the canal shares were *bona notabilia*, and must be considered, either as having no locality at all, or as lying in all the different dioceses through which the canal, out of which they arise, passes. If they are *bona notabilia*, which will scarcely be denied, and they are to be considered as lying in all the dioceses through which the canal passes, the probate in this case is clearly bad; for, "if a man hath *bona notabilia* to the value of 100s. in divers dioceses, the metropolitan shall grant the administration."—1 Roll. Abr. 908. 10 H. 7. 16 b. Then as to the locality of these profits, that will depend upon their legal nature and character, in which respect they will be found to stand alone, and distinct from any of the different species of *bona notabilia* hitherto defined by the law. Debts by simple contract follow the person of the debtor, and therefore are esteemed the deceased's effects in that diocese where the debtor resided at the creditor's death. 3 Bac. Abr. 38; Off. Executors, 47; Toll. Executors, 55. Debts by specialty are the deceased's goods in that diocese where the securities are at the time of his death. 3 Bac. Abr. 37; Off. Ex. 46; 1 Roll. Abr. 909; Shep. Touch. 463; Toll. Ex. 55. Debts on recognizances, statutes, or judgments, shall be *bona notabilia* where they were acknowledged or given. Com. Dig. Administration, B. 4; Dyer, 305, n.; Toll. Ex. 55. An annuity out of a personage shall be reputed to be property in the diocese where the personage lies. Com. Dig. Administration, B. 4; Toll. Ex. 56. And lease for years, where the land lies, not where

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the lease is merely found. Com. Dig. Administration, B. 4: Dyer, 305, n. 11 Vin. Abr. 80. Toll. Ex. 56. But a canal share does not range under either of those heads of property. It is a mere right to a proportion of the profits and advantages arising out of the canal. The act of parliament by which the canal company was incorporated, makes the shares personal estate. The question therefore is, first; whether a canal share has any locality, and, secondly, if it has, where it must be supposed to be situate for the purpose of probate or administration. First, considering it as having no locality, it then resembles most a share of stock in the public funds, for, like that, it is a mere right to a perpetual annuity. Now, for the purpose of giving effect to the probate and administration, stock is always supposed to lie within the Archbishopric of Canterbury, *Rex v. Capper (a)*, *Smith v. Stafford (b)*; and in that view of the case a prerogative probate would of course be necessary. Second, considering it as having some locality, it must be taken as local in every diocese through which the canal, out of which the profits belonging to it arise, passes. The very source and nature of those profits shew this argument to be correct. They are in the nature of a rent received by the proprietors for the use of the land—that rent arises in every diocese through which the canal passes. The whole quantity of land occupied by the canal, contributes to produce the entire profits—those profits, therefore, constitute, as it were, an annuity arising out of land, and if so, that annuity is *bona notabilia* where the land lies. It is no answer to this argument, that the act of parliament incorporating the company has declared that the canal shares shall be personal estate. That provision could not alter the locality of the property, if it previously possessed any. Besides, personal estate comprehends both personal chattels and real chattels, and a canal share in its nature resembles much more a chattel real than a personal chattel; inasmuch as it is a profit issuing out of land, similar to a

(a) 5 Price, 262. (b) 2 Wils. Ch. R. 166.

rent for a term of years, or an annuity upon land, both of which would be *bona notabilia* where the land lies. It is therefore submitted, that in either view of the case, a prerogative probate was necessary; whether the canal share has no locality at all, or whether it has a locality in every diocese through which the canal passes. But, if the Court entertain any doubt upon the subject, they will not grant a *mandamus*; because the party applying for that writ is bound to make out, first, that he has a specific legal right, and secondly, that he has no specific legal remedy. *Rex v. Archbishop of Canterbury* (a).

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Marryat and *Parke*, contra, were stopped by the Court.

LORD TENTERDEN, C. J.—It appears from the act of parliament by which this canal company was incorporated, that the shares are to be deemed personal estate, and to be transmissible as such, and not in the nature of real estate; the share in question, therefore, must be considered as personal property. It appears from the affidavits that the testator died at Birmingham, and that the transfer of the share to him was registered in the company's office at Birmingham. Upon the whole, therefore, I am inclined to think that this property was *bona notabilia* locally situate within the diocese where the will was proved, and that the probate, consequently, is sufficient. It seems to me that the executrix is entitled to have the probate entered in the company's book; and if there is any doubt as to the effect of the probate, and whether she can insist upon having her name registered as the proprietor of the share, the company may raise that question upon their return to the writ.

BAYLEY, J.—I also think that the probate ought to be

(a) 8 East, 212. See *Rex v. Bishop of Chester*, 1 T. R. 396; *Rex v. Bristol Dock Company*, Selw. N. P. 7th ed. 1069, 1080; *Rex v. Coleridge*, 1 Chit. Rep. 588, 592; *Rex v. Clear*, 7 D. & R. 393, 4 B. & C. 899, 3 D. & R. M. C. 438; Com. Dig. *Mandamus D.*

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registered by the company. The present rule may perhaps ask too much in claiming to have the name of the executrix registered as the proprietor of the share ; but still the *mandamus* ought to go, because the will at all events should be registered. The company may make a return to the writ, by which the other question may be more properly raised.

The other judges concurred.

Rule absolute.

The KING v. Sir GEORGE CHETWYND, Bart.

J.E. 7 Nov. 1825.
QUO *warranto* information for usurping the office of burgess of the Borough of Stafford. Plea, that on the 6th March, 1820, the mayor, the major part of the aldermen, and the major part of the capital burgesses of the said borough, being then and there the major part of the common council of the said borough, for the time being, duly assembled and met together, as such common council, within the said borough, for the purpose of electing, swearing, and admitting a burgess of the said borough, and being so assembled and met together, and so being the major part, &c., it then and there seemed fit and convenient to them to elect, swear, and admit, and they did elect, swear, and admit the said defendant to be a burgess, into the office of a burgess of the said borough, &c. Replication, that notice of the purpose for which the supposed assembly or meeting of the common council was to be held, was not, at any time before the said assembly or meeting was held, given to the then aldermen and capital burgesses of the borough, or any or either of them ; and the said assembly or meeting was held without any notice having been given that the same was to be held for the purpose of electing a burgess or burgesses. Rejoinder, that the said assembly or meeting was held at the instance of the then mayor of the said borough, for the purpose of

There may be a good elective assembly of a select body in a corporation, without notice of the purpose of the assembly being previously given.

Therefore, where to a *quo warranto* information defendant pleaded, that he was elected by the major part of the common council duly assembled, a replication stating that notice of the purpose for which the assembly was to be held had not been given, was held bad on demurrer.

electing a burgess, theretofore, to wit, on the 24th December, 1818, at the then office of the then mayor of the said borough, at eleven o'clock in the morning; and that before the holding of the said assembly, &c. notice thereof was given to the then aldermen and capital burgesses of and within the borough, in manner therein set out, (describing the written notice, and the twice tolling of St. Mary's church-bell 21 times,) being then and there the usual and customary manner of giving notice to the aldermen and capital burgesses, of the holding of a common council for the purpose of electing burgesses, and being then and there well known to them to be such customary manner of giving notice, &c. Surrejoinder, that the manner of giving notice of the holding of the common council in the rejoinder mentioned, hath been and is the usual, and customary, and universal, and only manner of giving notice to the aldermen and capital burgesses of and within the said borough, of the holding of a common council, for whatever purpose the same hath been, or is, summoned or held, or whatever business hath been to be, or hath been transacted or done thereat; and that for 50 years last past, such notice of the holding of the common council hath been given to the aldermen and capital burgesses, for whatever purpose the said common council hath been summoned or held, and whatever business hath been to be, or hath been transacted or done thereat; and that there hath not been, and is not, any usual or customary manner of giving notice of the holding of a common council for the election of burgesses, different or distinct from the said manner of giving notice of the holding of the same, for whatever purpose the same hath been summoned or held, or whatever business hath been to be, or hath been transacted or done thereat. Demurrer, and joinder (a).

(a) The pleadings were exceedingly voluminous and diffuse, but the portion of them above set out is all that regards the single point decided in the case. The points

intended to be insisted upon in the argument of the demurrer, as stated in the margins of the paper-books were these;—

On the part of the relator, that

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The case was argued in Michaelmas Term, 1826, by *R. Bayly* for the defendant, and *Campbell* for the relator. The only cases cited were *Rex v. Theodorick (a)*, and *Rex v. Hughes (b)*. Judgment was now delivered by

Lord TENTERDEN, C. J.—This was a proceeding by information in the nature of a *quo warranto*; to try by what right the defendant held a certain office in the borough of Stafford; and it is sufficient for the present purpose to state that the plea set forth an election of the defendant by an assembly of the mayor and common council of that borough, whom the plea stated to have been duly assembled for the purpose of electing. The replication alleged that no notice was given of this assembly, or of the purpose for

the surrejoinder is sufficient, as it shews that proper notice was not given of the meeting at which the defendant was elected—that the rejoinder is bad, for not traversing, or confessing and avoiding, the replication. On the part of the defendant, that the surrejoinder is bad, inasmuch as the rejoinder, though no previous notice is required by any prescription or charter, states that a previous notice was in fact given, describing it, and stating that it was then the usual and customary manner of giving notice of the holding of the common council for the purpose of electing a burgess, and well known to the aldermen and capital burgesses to be such usual and customary manner of giving notice; yet the surrejoinder, without denying it to be the usual and customary manner of giving notice for this purpose, states that this manner of giving notice is the usual, and customary, and universal, and only manner of giving no-

tice of the holding of a common council, for whatever purpose it is held, or whatever business has been to be transacted thereat; and that there is not any usual or customary manner of giving notice of the holding of a common council for the purpose of electing a burgess, different or distinct from the said manner of giving notice of the holding of a common council, for whatever purpose the said common council has been held; whereas the question upon the rejoinder is, whether the manner of giving notice, at the time the notice was given, and the common council held for electing the defendant, was the usual manner, and whether the notice given was the usual notice for holding a common council for the purpose of electing a burgess; and not whether notices like it were given for holding a common council for other purposes.

(a) (Thetford) 8 East, 543.

(b) 6 D. & R. 443, 4 B. & C. 368, 3 D. & R. M. C. 250.

which it was about to assemble. That is the substance of the replication. That has led to a rejoinder, and a surrejoinder, and then comes a demurrer. Now the proper way of raising the question intended to have been raised by the replication would have been to deny that the assembly was duly assembled. That would have brought the question before a jury. All the facts necessary to a due consideration and decision of that question might then have been received in evidence, and might, if necessary, have been put upon the record in the shape of a special verdict: and that is the form that would have been adopted some few years ago; such a replication as this would not then have been resorted to. The object of this replication was to bring the question of law immediately before the Court, without resorting to the expense of a trial at all; and that is a legitimate object where it can be legitimately obtained: where it cannot, it leads only to perplexity. Now the replication that no notice of the purpose for which this meeting was to be held was given, assumes, as a proposition of law, that there cannot be a due assembly of a select definite body of a corporation, as this is, for the purposes of an election, unless notice be given of the purpose of the intended meeting. The replication assumes that as a proposition of law. If that proposition is not universal, the replication is bad. If there may be a good elective assembly, without notice of the purpose, under some circumstances, and may not under others, the replication has not done enough. We are all of opinion that it is not a general proposition of law, that there may not be a good elective assembly of a select body of a corporation, although no notice of the purpose of the meeting may have been previously given. The case relied upon in argument in support of that proposition was *Rex v. Hughes* (a). But the two cases are very distinguishable. It appears to me impossible to say, that there may not be, under some circumstances, a valid elective assembly, by a select part of a corporation,

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(a) 6 D. & R. 443; 4 B. & C. 368; 3 D & R. M. C. 250.

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without previous notice being given of the object. Suppose every member were present, and they all agreed that they would proceed to an election, and they did proceed; it would be exceedingly hard for us to say that it would not be a good election (a). Suppose a long and uninterrupted usage to have been alleged, and that usage to have been without question or dispute, that, after due warning to every member of the common council to attend a meeting, it was usual to proceed to an election, although the special purpose of the meeting had not been previously intimated; it would be very difficult, in pronouncing an opinion, at least, to say that an election so made would not be good. Now if there may be any case in which there may be a good election, without notice of the purpose being previously given, this replication is not a good one. We are all of that opinion; and therefore the judgment in this case, on that part of the pleadings at least, must be for the defendant.

Judgment for the defendant.

(a) "When the notice is regularly given, a majority have power to do any corporate act; but if the whole assembly meet by accident, they may proceed on business, provided they are unanimous; but

otherwise it is if any one member of the corporation dissents, he has an absolute negative:" per Lord Hardwicke, C. J. in *Res v. Kynaston*, Selw. N. P. 7th ed. 1158; and see *post*, 542 (a).

The KING v. ROBERT DAVIES.

Any burgess is a competent relator in *quo warranto* against a party exercising the office of town-clerk, though the right of electing to that office be in a select body.

IN last term *R. Scarlett* obtained a rule calling on the defendant to shew cause why an information, in the nature of a *quo warranto*, should not be exhibited against him to shew by what authority he claimed to be common clerk or *prothonotary* of the city or borough of Wells, in the county of Somerset, on two grounds; first, that there was no due

notice of the meeting at which he was elected to that office; and secondly, that there was not a sufficient number at the meeting to elect him. This rule was obtained upon the affidavit of *Daniel Beaumont Payne*, stating as follows:—

“ That he is one of the burgesses of the city or borough of Wells, in the county of Somerset; and that by a charter of Queen *Elizabeth*, dated the 19th day of July, in the 31st year of her reign, her said majesty did, amongst other things, grant that the burgesses of the said city or borough of Wells, and their successors for ever thereafter, might and should be one body corporate and politic in deed, fact and name, by the name of the mayor, masters and burgesses of the city or borough of Wells, in the county of Somerset; and further, that for ever thereafter there might and should be in the city or borough aforesaid one mayor and twenty-three of the most discreet and honest burgesses of the city or borough aforesaid, who should be called the common council of the city or borough aforesaid, with power to make bye-laws; and that for ever thereafter there should be in the city or borough aforesaid one mayor and seven masters in number only, out of the burgesses of the city or borough aforesaid, being of the common council of the same city or borough, in form thereafter specified to be chosen and appointed; and that for ever thereafter there might and should be in the city or borough aforesaid sixteen other men of the better and more honest burgesses of the city or borough aforesaid, by the same mayor, recorder and masters, or the greater part of the same, to be elected, who, together with the aforesaid mayor and seven masters of the city or borough aforesaid, should fill up the number of twenty-four chief burgesses or councillors of the same city or borough, and should be, and should be reputed and named the chief burgesses and councillors of the same city or borough, and which twenty-four chief burgesses or councillors should make, and should be for ever in all future times for ever, and should be called, the common council of

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the city or borough aforesaid, for all things, matters, causes and business touching or concerning the borough aforesaid, and the good rule, state and government of the same; and that every of the aforesaid twenty-four chief burgesses, not being in the office of mayor of the city or borough aforesaid, should and might be, from time to time, assisting and aiding the mayor of the same city or borough, for the time being, in all causes and matters touching or concerning the same city or borough: and her said majesty did thereby further grant, *that there should be in the city or borough aforesaid one honest and discreet man in form thereafter expressed to be elected and nominated, who should be, and should be named the common clerk and prothonotary of the city or borough aforesaid*, and that the common clerk so as aforesaid elected and nominated, before he be admitted to execute that office, should take a corporal oath; before the mayor for the time being, rightfully, well and faithfully to execute that office of common clerk of the city or borough aforesaid; *and that the mayor, masters and chief burgesses of the same city or borough for the time being, or the greater part of them, might and should be able to elect, prefer and nominate one honest and discreet man, from time to time, as common clerk or prothonotary of the city or borough aforesaid*; and that he, so as aforesaid elected, nominated and preferred as common clerk or prothonotary of the city or borough aforesaid, might and should be able to have, enjoy and exercise the office of common clerk of the city or borough aforesaid, so long as he should well conduct himself in the same. That deponent has also been informed and believes that such charter was accepted, and is now the governing charter of the said city or borough. That he hath been informed, and verily believes the same to be true, that at a meeting or convocation of the mayor, masters and chief burgesses of the said city or borough, held on the 21st. day of June, in the year 1822, Robert Davies, Gent. (the defendant) was elected to be the common clerk or

prothonotary of the said city or borough, in the room of *George Biggs Lar*, then dead, and that he has ever since held and exercised, and now holds and exercises, that office; that he has been informed and verily believes that at such meeting or convocation, held as aforesaid, and at which the said *Robert Davies* was so elected to his said office, there were present of the said mayor, masters and chief burgesses, only the mayor, six masters and six chief burgesses (a), who were or claimed to be chief burgesses; that he is informed and believes that the notice or summons calling such meeting or convocation did not apprize the masters and capital burgesses that a common clerk or prothonotary was to be elected or proposed, or what was the business to

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(a) Where the mayor and aldermen for the time being, or the greater part of them, are empowered by charter to chuse or name four of the burgesses or inhabitants, "out of which four, so to be named and chosen, the mayor, aldermen, bailiff, principal burgesses, and other burgesses and inhabitants of the borough for the time being (they being also for that purpose upon the same day congregated or assembled together), or the greater part of them, as should be so congregated and assembled, might have power and authority, by the greater part of the voices of them so assembled together, to chuse and make one to be the mayor:" it was held, that the election of a mayor by a majority of the whole elective body, taken collectively, was invalid, it appearing that there was not a majority of each definite body of principal burgesses present at the time of the election. *Rex v. Bower*, 2 D. & R. 761; S. C. 1 B. & C. 492. So where a charter of a corporation, consisting of a mayor

and twenty-four capital burgesses, granted that when and so often as it should happen that any one or more of the offices of these capital burgesses should be vacant, it should be lawful to the other capital burgesses "at that same time surviving or remaining, or the greater part of the same, of whom the mayor for the time being should be one, to elect another or others of the burgesses of the said borough, into the place or places of the capital burgess or burgesses so happening, &c.;" and a burgess having been elected to fill up a vacancy by twelve burgesses only, who were alleged to be capital burgesses at that time surviving and remaining: it was held, that the election was void, it not having been made by a majority of the whole definite body of capital burgesses, to which body the words, "or the greater part of the same," were referable. *Rex v. Devonshire*, 1 B. & C. 609. And see *Rex v. Wylliams*, 3 D. & R. 75; S. P. *Rex v. Headley*, ante, 345; S. C. 7 B. & C. 496.

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be transacted at such meeting (a); that he is also informed and believes that the said 21st day of June is not a day fixed by the charter for the election of a common clerk or other officer of the said corporation."

In answer to the application an affidavit was made by the defendant and *John Hoare*, in which the former stated, "that on the 21st day of June, 1822, this deponent was elected and sworn to the office of town-clerk of said city or borough of Wells, in the room of *George Biggs Lax*, deceased, at a convocation or meeting of the mayor, masters and chief burgesses of the city or borough, that day held at the town-hall or council-house in the said city or borough, and that he hath from that time diligently, faithfully and honestly, to the best of his skill and understanding, executed and performed the duties of the said office; that he hath made inquiries of divers members of the common council of the said city or borough as to the purport or contents of the notice which was issued to convene the meeting at which he was so elected town-clerk as aforesaid, and that he hath ascertained that *Henry Hope*, Esq, the then mayor of the said city or borough, issued a notice to the several members of the said common council, residing within the said city or borough, requiring their attendance at the town-hall." *Hoare* stated, "that in such notice it was expressed that the meeting was to be held for the purpose of electing a town-clerk; and that he now is, and was on the said 21st day of June, 1822, a capital burgess or one of the said common council of the said city or borough, and that he hath in his possession a notice in writing, delivered to him previously to the said meeting, signed by the said *Henry Hope*, the then mayor, and addressed to him said *John Hoare*, which is in the words or to the effect following; that is to say—

(a) This objection was afterwards abandoned. As to the sufficiency of notice of a meeting for the purpose of an election, see *Rex v. May* (Saltash), 5 Burr. 4681;

Rex v. Kynaston, Selw. N. P. 7th ed. 1158, *ante*, 538, (a); *Rex v. Hill* (Monmouth), 6 D. & R. 593; 4 B. & C. 426; *Rex v. Chelwynd* (Stafford), *ante*, 534.

' Wells City.

' To —

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' You are requested to attend a meeting of the corporation on Friday the 21st day of June, 1822, at 12 o'clock in the forenoon, for the election of a town-clerk.

' *Henry Hope, Mayor.*' "

Then the defendant stated, "that he has seen the said *Henry Hope*, who informed deponent that from his memory he was unable to state the contents of the notice by him issued for convening the said meeting; whereupon this deponent produced to said *Henry Hope* the said original notice, and the said *Henry Hope* stated to this deponent that he had no doubt but that he had issued similar notices to the other members of the common council, of the like tendency and effect, and that he has requested, but is unable to prevail on, the said *Henry Hope* to verify such statement by affidavit to be exhibited in this honourable Court; and that this deponent believes the reason of the said *Henry Hope* for declining to do so is because he is opposed to this deponent, and because the said *Daniel Beaumont Payne* is the copartner and brother-in-law of the said *Henry Hope*; and that he verily believes that the said *D. B. Payne* made the said application to this honourable Court by and with the privity and concurrence of the said *Henry Hope*; and that by the charter of her late majesty Queen *Elizabeth*, mentioned or referred to in the affidavit of said *D. B. Payne*, the right of electing, nominating or chusing a town-clerk of the said city or borough is in the mayor, masters and chief burgesses, *being of the common council*, and that neither by the said charter, nor by any usage or custom of the said city or borough, *have or hath any of the burgesses of the said city or borough, not being of the common council, any right whatever to interfere in the choice or election of such officer*; and to the best of his knowledge the town-clerk of the said city or borough is solely a ministerial officer, and subservient to the order, rule and governance of the mayor, masters and capital burgesses, being of the common council

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of the said city or borough, but not to the other burgesses of the said city or borough; and that to the best of his knowledge and belief, and so far as he has been enabled from experience in the said office or otherwise to discover, there are *no judicial acts or rights of any kind soever attached to the said office of town-clerk of the said city or borough, whereby or by reason whereof such burgesses or the inhabitants, residents, householders, of the said city or borough, can or may be affected or injured, or their rights or interests prejudiced*; and that the said *D. B. Payne* is not a member of the common council of the said city or borough, and that he is not a resident householder or inhabitant of the said city or borough, and, to the best of this deponent's knowledge or belief, cannot be affected or prejudiced by any acts of this deponent in his said office; and that the said *D. B. Payne* was elected and admitted a burgess, *ex gratia*, by the said mayor, masters and chief burgesses of the said city or borough, and had no inchoate right whatever to that office; and that at the last election for members to serve in parliament for the said city or borough of Wells, this deponent and the said *D. B. Payne* supported different candidates, and this deponent verily believes that for that cause the said *D. B. Payne* hath made his application to this Court."

Scarlett, A. G. and *R. Scarlett*, abandoned the first ground of objection. Upon the second ground,

Taunton now shewed cause. Though at the meeting at which the defendant was elected, a majority of the whole body was present assembled, yet as only six chief burgesses were present; it must be admitted (a) that the election would have been void if the person who makes this application had been a competent relator. But *Mr. Payne*, who makes this application, is merely a common burgess. Now, it is expressly sworn, that no function is executed by the town-clerk in which the burgesses at large are interested.

(a) *Ante*, 541, note (a).

Lord TENTERDEN, C. J.—Although the burgesses at large may have no share in the election of the town-clerk, as soon as he is chosen, he is a ministerial officer, in whom all the burgesses have an interest.

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Rule absolute (a).

(a) A stranger to the corporation, if subject to its local jurisdiction, may be a relator. *Rex v. St. John* (Wootton-Bassett, E.T. 1812),

Selw. N. P. 7th ed. 1147; *Rex v. Hodge* (Penryn, 1819), 2 B. & A. 344, n.; *Rex v. Headley*, (Devizes,) ante, 345, 7 B. & C. 496.

The KING v. The MAYOR, ALDERMEN and BURGESSES of the Borough of DONCASTER.

THIS was a rule calling upon the Mayor, Aldermen, and chief Burgesses of the Borough of Doncaster, to shew cause why a writ of *mandamus* should not issue, directed to them, commanding them to admit and swear one *Buckland* into the place and office of a freeman or free burgess of that borough.

The affidavit upon which the rule was obtained stated, that Mr. *Buckland* had been articled clerk, or *apprentice*, to a freeman of the borough, who was an attorney, for the space of seven years, and had duly served him all that time; that his articles had been duly enrolled, according to the statute, and had also been enrolled with the Corporation, in obedience to a bye-law; that at the expiration of the term he applied to be admitted a freeman, by reason of this apprenticeship; that the Corporation took time for consideration, and ultimately refused to admit him, assigning as the ground of their refusal, that he had not served an *apprenticeship* to any trade; that the Corporation had admitted a person to be a freeman who had served an apprenticeship to an architect, and that there was no bye-law of the Corporation prohibiting the admission of any person coming within the description of Mr. *Buckland*.

An attorney is not a trader, nor is his articled clerk an apprentice, so as to entitle the latter to the freedom of a Corporation as by *apprenticeship* to a freeman, being a trader.

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The affidavit, in answer to the rule stated, that by the usage and custom of the borough, such persons only were admitted freemen by virtue of apprenticeship as had served seven years as apprentices to freemen who were traders; that there was no instance on record of any attorney having been admitted by reason of his service under articles of clerkship, nor of any application for the admission of such a person; that there were many instances on record of refusal to admit persons who applied for admission by reason of their apprenticeship, on the ground that they had not served as apprentices to traders; that in the instance mentioned in Mr. Buckland's affidavit, the master was a builder as well as an architect, and his apprentice was admitted expressly on the ground that a builder came properly within the denomination of a person exercising a trade; and that in the borough there were various guilds, or fraternities of the several traders, but none of attorneys, and none to which they could properly belong.

Tindal, S. G., Parke, and Patteson, shewed cause. It is clear upon these affidavits that there is no ground for this application. In the absence of any instance of the admission of an attorney's clerk, it is impossible to say that his apprenticeship, as it is called, to an attorney, is an apprenticeship to a person exercising a trade. The constitution of the corporation shews that such an apprenticeship was not contemplated, for there is no guild or fraternity of attorneys. An attorney is not a trader, either in the legal or ordinary acceptance of the word, for he is not liable to the bankrupt laws (a).

The Court having intimated a strong opinion that the motion could not be supported,

(a) Such attorneys, however, as dealt with money in the joint capacity of scribes and bankers, might be made bankrupts as money-scriveners; (see the cases in Mann. N. P. Dig. 2d ed. 49, pl. 4, 5, 6, 7; Hammond's Equity Dig. 49, pl. 14) and now all persons using the trade or profession of a scrivener, receiving other men's moneys, or estates into their trust or custody, 6 Geo. 4, c. 16, sect. 2.

Scarlett, A. G., contra, did not press the case.
Lord TENNYSON, C. J. It is quite impossible to say that an attorney is a trader, or his articulated clerk an apprentice; therefore this rule must be discharged.

The other Judges concurred.

Rule discharged.

The King v. The Justices of the West Riding of Yorkshire.

THIS was a rule calling upon the defendants to shew cause why a writ of *mandamus* should not issue, directed to them, commanding them to enter continuances to the next General Quarter Sessions for the said riding, and to hear an appeal against the confirmation of an order of certain trustees, under an act of parliament of the 6 Geo. 4, c. 3 (a), for the stopping up of a certain public highway.

The affidavit upon which the rule was obtained stated, that due notice of appeal had been given, but that the Court of Quarter Sessions refused to hear the appeal, upon the ground that the notice was insufficient, in not stating that the appellant was a party aggrieved by the order; inasmuch as by the act in question the appeal was given to parties "aggrieved, upon giving a notice in writing of such appeal, duly signed," &c.

Where a statute gives a right of appeal against acts done in pursuance thereof to "parties aggrieved" by such acts, the notice of appeal must state that the appellant is a party aggrieved by the act of which he complains.

Tindal, S. G. and **Alderson** shewed cause. They con-

(a) A local and personal act, entitled "An act for making and maintaining a turnpike road from the turnpike road called Wellington bridge road, near the town of Leeds, in the West Riding of the county of York, to the turnpike road leading from Wakefield to Bradford, in the said riding, near a certain place called Tong Lane End, in the lordship or liberty of Tong, in the parish of Bradford, in the said riding, with several branch roads therefrom;" and to which the powers of the statutes, 3 Geo. 4, c. 136; 4 Geo. 4, c. 95; and 5 Geo. 4, c. 69, the new general turnpike acts, are extended:

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tended that the notice of appeal was clearly bad, and relied upon *Rex v. The Justices of Esser* (a), as an authority expressly in point.

Stanlett and Blackburne contra. It must be conceded that the case referred to is in point; but it is submitted that the decision there arrived at ought to be reconsidered, as it lays down a rule not only unnecessary, but calculated to produce much mischief and inconvenience. The act of parliament does undoubtedly give the right of appeal to parties aggrieved; but it by no means follows from that that the party appealing must state in his notice of appeal that he is aggrieved. The very fact of his appealing is a declaration that he considers himself aggrieved; and if upon the hearing of the appeal, he proves himself to have been aggrieved, that is quite sufficient; because, unless he adduces that proof, he must fail in his appeal, and be burdened with the costs. Many acts of parliament, which give a right of appeal, require specifically that the notice of appeal shall contain the allegation that the appellant is a party aggrieved by the act of which he complains. Many other acts of parliament contain no such requisition, nor does the one in question; and the inference arising from this variation is very strong, namely, that where the allegation is not specified in the act, it was not the intention of the legislature to require it.

Lord TENTERDEN, C. J. The case of *Rex v. The Justices of Esser* is precisely in point with the present. If, however, the decision in that case was wrong, it ought not to be persevered in. As the point has been again pressed upon us, we will take time to reconsider it.

Cur. adv. vult.

(a) 7 D. & R. 658; 5 B. & C. 431; 3 D. & R. M. C. 483; where it was held that a notice of appeal by an inhabitant of a parish against an order for stopping up an unnecessary public footway, under

the authority of 55 Geo. 3, c. 68, s. 2, must state that the appellant is "injured" or "aggrieved," pursuing the language of s. 3, the appeal clause, or the party will have no *locus standi in curia*.

Judgment was afterwards delivered by Lord TENTERDEN, C. J., to the following effect. We have reconsidered the point raised in the former case of *Rex v. The Justices of Essex*, and in the present case; and upon the best consideration we have been able to apply to it, we are unanimously of opinion that the decision in the former case was right, and ought not to be over-ruled. If the question had been now agitated for the first time, we should have come to the same determination. We think that where a statute gives a right of appeal against acts done in pursuance of that statute, to parties aggrieved by such acts, the notice of appeal must state that the person appealing is a party aggrieved by the act of which he complains. The appeal in this case is given to parties aggrieved; and as the appellant has not stated in his notice that he is a party aggrieved, we are of opinion that the notice is bad. The consequence is that the sessions did right in dismissing the appeal, and that this rule for a *mandamus* to them to rehear it must be discharged.

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Rule discharged (a).

(a) See *Rex v. Cook*, ante 526.

MALTBY and another, Assignees of ELLILL, a Bankrupt,
v. CARSTAIRS and others.

THIS was an action of *assumpsit*, brought by the plaintiffs as assignees of the estate of *John Ellill*, a bankrupt, to recover the sum of '1,861*l.* 3*s.* 10*d.* being the alleged surplus of the proceeds of certain securities placed by the bankrupt, *Ellill*, before his bankruptcy, in the hands of *Kensington & Co.* bankers, beyond their claim; and which surplus has been received by the defendants, in their character of assignees of *Kensington & Co.*, who became bankrupts in the year 1812. The declaration consisted

A., the creditor of *B.* by bills for which *C.* and *D.* are sureties, by a deed to which *B.* and *C.* are parties, discharges *B.* and *C.*, reserving his remedies against *D.*;—such reservation is not defeated by a stipulation that the bills shall be delivered up, it appearing that such stipulation was intended to be so modified as to give to *A.* the benefit of such reservation.

intended to be so modified as to give to *A.* the benefit of such reservation.

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of a count for money had and received, with the other money counts, a count for interest, and a count upon an account stated. The defendants pleaded the general issue, with a notice of set-off. At the trial before Abbott, C.J. at the London sittings before Michaelmas term, 1822, a verdict was found for the plaintiffs, damages 1,861*l.* 3*s.* 10*d.* subject to the opinion of the Court upon the following case :

On the 4th September, 1809, a commission of bankrupt issued against *John Ellill*, late of London, lead merchant, who was duly found and declared a bankrupt, and the plaintiffs are assignees of his estate and effects under that commission : and on the 23d July, 1812, a commission of bankrupt issued against *Kensington and Co.*, of London, bankers, who were duly found and declared bankrupts, and the defendants are assignees of their estate and effects under that commission.

Ellill, prior and up to the period of his bankruptcy, kept a banking account with *Kensington & Co.*, who were in the habit of making advances of money to him, by way of discount, and otherwise. As a general collateral security to *Kensington and Co.* for any debt which might become due from *Ellill* to them, either in respect of transactions between them, or in respect of any bills bearing his name, of which they might by any other means become the holders, *Ellill* from time to time paid to them various bills of exchange; and also, by indentures of lease and release, dated 26th and 27th June, 1809, and made between *Ellill* of the one part, and *Kensington and Co.* of the other part, *Ellill* conveyed certain property belonging to him to *Kensington and Co.*, the deeds containing all proper powers of sale.

At the time of *Ellill's* bankruptcy there was a cash balance due from him to *Kensington & Co.* to the amount of 3,574*l.* 1*s.*, and at that time, besides the property conveyed by the deeds of 26th and 27th June, 1809, the following bills of exchange, which had been deposited with them by *Ellill*, as a general collateral security, remained in their hands; namely, ten bills, drawn by *Ellill* upon, and accepted

by *Slade and Son*, amounting to 7,957*l.* 9*s.* 5*d.*, and one bill, drawn by *Ellill* upon, and accepted by, *George Lewis*, for 943*l.* 7*s.*; but none of these bills had the name of *Easterby and Co.* thereon.

Ellill was in the habit of accepting bills for *Easterby and Co.*'s accommodation, and also for value, and at the time of his failure was under acceptances to more than 160,000*l.* for accommodation. *Easterby and Co.* had negotiated these bills to a considerable amount; and *Atkinson and Mount*, of Broad Street, became the holders of 18,200*l.* of these bills, which they, before the bankruptcy of *Ellill*, deposited with their bankers, *Kensington & Co.*, as collateral securities for their own notes of hand discounted by *Kensington and Co.*

All demands which *Kensington and Co.* had against *Ellill*, on transactions with him, were satisfied out of the proceeds of the property conveyed by the deeds of 26th and 27th June, 1809, which property was sold in that year, after *Ellill*'s bankruptcy, by the plaintiffs, who applied to *Kensington and Co.* for their consent to sell, for 6,000*l.*, which consent they gave on condition that all the proceeds should be paid to them on *Ellill*'s account; and it was so agreed; and they accordingly received the deposit, and the plaintiff, *Maltby*, afterwards, on the 16th April, 1812, paid to *Kensington and Co.*, out of the said proceeds, 4,000*l.*, which overpaid the cash balance due to them by 425*l.* 10*s.*

The defendants have also, since the bankruptcy of *Kensington and Co.*, that is, in 1814, received the balance of the said proceeds, and they have also received from the parties, upon the bill accepted by *Lewis*, a further sum of 282*l.* 1*s.* 1*d.*. The sums so received by the defendants, beyond what would be necessary to satisfy the cash balance due from *Ellill*, amount to 1861*l.* 3*s.* 10*d.*, the sum sought to be recovered in the present action; but the defendants insist upon a right to retain that sum, in respect of a demand upon the bills of exchange deposited by *Atkinson and Mount* exceeding that amount.

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Prior to *Ellill's* failure, *Kensington* and Co. were the bankers of *Atkinson* and *Mount*, and had discounted for them their notes of hand, receiving from them, by way of collateral security, bills of exchange to a very large amount, among which were bills to the amount of 18,200*l.*, drawn by *Easterby* and Co. upon, and accepted by, *Ellill*.

Atkinson and *Mount* failed, and at the time of *Ellill's* bankruptcy *Kensington* and Co. held the bills accepted by him for 18,200*l.* as a collateral security for *Atkinson* and *Mount's* account.

After *Ellill's* bankruptcy, *Easterby* and Co. became embarrassed in their circumstances, and found it necessary to make an arrangement with their creditors, among whom were *Kensington* and Co. in respect of the bills held by them, as before mentioned.

The arrangement so made was carried into effect by a deed, dated 23d June, 1811, to which the plaintiffs were parties as creditors of *Easterby* and Co., and likewise *Kensington* and Co. and several other persons; an abstract of which deed accompanies this case (a).

Kensington and Co. refused to execute this deed upon the application of *Easterby* and Co. until they obtained, on the 26th March, 1812, the following letter from *Ellill's* assignees :—" We consent to your executing the deed of arrangement of *Easterby* and Co, with their creditors, without prejudice to your security on the premises late belonging to *Ellill*, at Bankside ;"—upon which *Kensington* and Co. executed the deed. After the execution of the deed, and in pursuance thereof, *Kensington* and Co. gave up the bills accepted by *Ellill*, amounting to 18,200*l.*, with various others amounting to 47,288*l.* 2*s.* 1*d.*, to *Easterby* and Co., and received from the trustees under the deed a

(a) This abstract is of enormous length; and as the deed, so far as it bears upon this case, is very fully set out in the case of *Ex parte Carstairs* (b), which arose out of

the same transaction, both by the reporter in the statement of the case, and by Lord *Eldon* in delivering judgment, it is deemed unnecessary to repeat it here.

(b) 1 Buck's Cases in Bankruptcy, 560.

receipt, and a debenture, stating that *Kensington* and Co. were holders of bills drawn by *Easterby* and Co. to the amount of 18,200*l.*, on which they had advanced money to various persons, to the amount of 22,857*l.* 10*s.* 10*d.*; and that they had given up such bills and executed the deed of arrangement, whereupon this debenture was given to them, to secure payment of the said sum of 22,857*l.* 10*s.* 10*d.* by dividends, in proportion to the sum of 47,288*l.* 2*s.* 1*d.*, the amount of the bills so given up, until the same should be paid out of the trust funds provided by the deed of arrangement. Upon this debenture payments have been made to the amount of 4*s.* in the pound upon the said sum of 47,288*l.* 2*s.* 1*d.*

After the execution of the deed of arrangement, the accounts between *Ellill's* estate and *Easterby* and Co. were referred to arbitration, and an award was made, stating, among other things, "that it likewise appears that *Ellill* has accepted for *Easterby* and Co. bills to the amount of 166,886*l.* 2*s.* 3*d.*, not any part whereof is included in the before-mentioned balance, and that *Easterby* and Co. must either deliver up to the assignees of *Ellill* all the said bills, or account for the same."

After this award, the plaintiffs and *Easterby* and Co. arranged the account, and upon that occasion the bills drawn by *Easterby* and Co. upon *Ellill*, amounting to 18,200*l.*, were delivered up by *Easterby* and Co. to the plaintiffs, and the account settled accordingly; and such bills have ever since remained in the plaintiffs' hands.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover the said surplus of 1861*l.* 3*s.* 10*d.* from the defendants. If the Court shall be of opinion that the plaintiffs are so entitled, the verdict is to stand; otherwise, a nonsuit is to be entered (*a*).

(*a*) The statement of the point intended to be argued, as set out in the margin of the paper books was this:—"The question arises upon bills to the amount of 18,200*l.*, accepted by *Ellill* for the accommodation of *Easterby* and Co., and which were in the

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F. Pollock, for the plaintiffs. The question in this case is, first, what was the legal operation of the deed of arrangement originally; and secondly, was that operation in any degree varied by the letter of the 26th March, from the plaintiffs to *Kensington and Co.* First, by the legal operation of the deed, and of the arrangement made in pursuance of it, all claims of *Kensington and Co.* upon *Easterby and Co.* were satisfied. The debts were not only extinguished, but all securities given in respect of them were delivered up; so that there remained no claim against either the makers of the promissory notes, or the drawers of the bills of exchange. It would be extremely unjust if this were not so; for the bills and notes were in effect cancelled; the account was settled; and the bills were delivered over to the plaintiffs as a satisfaction of so much of their claim. One main object of the deed was to enable *Kensington and Co.* to prove in respect of the bills for 12,000*l.* and to provide for the extinguishment of that debt; and the legal operation of it was an absolute release of *Easterby and Co.*'s debts. Then that being the legal operation of the deed itself, there is, secondly, nothing in the letter of the plaintiffs to *Kensington and Co.* that can vary that operation. It states that they consent to *Kensington and Co.*'s executing the deed, without prejudice to their security on the premises at *Bankside*. But that security must have been given for a purpose consistent with the arrangements contemplated by the deed. The

hands of *Kensington and Co.*, and by them given up to *Easterby and Co.*, and by *Easterby and Co.* to the plaintiffs. It will be contended on the part of the plaintiffs, that the debts from *Easterby and Co.* to *Kensington and Co.* were, when assigned, they, or having been paid, the defendants cannot retain the surplus they have received; and that *Kensington and Co.* having given up the said bills to the amount of 12,000*l.* to *Easterby and Co.*, whereby *Easterby and Co.* were enabled to settle accounts with *Easterby and Co.*'s assignees, as if each bill had been paid or redeemed, *Kensington and Co.*'s assignees cannot now claim to retain the said surplus, in part satisfaction of such bills, or otherwise."

case of *Ex parte Carstairs* (a) cannot in any degree govern the present. The question there arose upon *Slade's* acceptances, and was very different from the question now before the Court. At all events, the doctrine there laid down, with respect to bills of exchange, cannot by possibility apply to the legal conveyance of a real estate.

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Parke, contra. At the time when the deed was executed, *Kewington and Co.* had the means of securing the payment of their debts in their own hands;—can it then be supposed, that by executing that deed they intended to sacrifice those means, or to give up any collateral security they possessed? Surely not. If so, there is no real difference between their claims in respect of the proceeds of the *Bankside* estate, and their claim in respect of *Lewis's* bill and *Slade's* bill. The question here, so far as *Lewis's* bill is concerned, is precisely the same question determined by Lord *Eldon* in *Ex parte Carstairs*. The propriety of that determination is not denied; but it is said that its operation does not extend to the *Bankside* estate, but at most to *Lewis's* bill only. There is, however, no real ground for that argument. The only object of the deed, as regarded *Kewington and Co.*, was to release the estate of *Easterby and Co.*: the bills were given up solely with that view; and the claims of the parties, in respect of other securities, and as against other persons, were expressly reserved to them, out of the operation of the deed. Lord *Eldon*, in his judgment in *Ex parte Carstairs* (a), takes precisely this view of the case. He says, “the mortgagees of *Easterby and Co.* and other persons, being creditors of *Easterby and Co.*, release” them and the *Pullers*. “*John Ellill* being a bankrupt, they do not release him or his estate; whether that was a mistake or not I cannot tell. They release them, *Easterby and Co.*, of and from all the debts, sums of money, and demands whatever, which now are due and owing to them the said cre-

(a) 1 Buck's Cases in Bankruptcy, 560.

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ditors, from the said firm of *Easterby* and Co. They do release, *but not the estate of Ellill*, or the *Pullers*, of and from all judgments, bonds, bills, notes, and other securities, made, given, or entered into, for securing the payment of the said debts, &c. which they might be entitled to, against the firm of *Easterby* and Co. or against the *Pullers*; subject, and without prejudice, nevertheless, to the claims and demands of the said creditors respectively, under and by virtue of the trusts and provisions hereinbefore contained. Now this proviso certainly contains very general words; but the question is, looking at the creditors, whose object was the payment of the debts of *Easterby* and Co., and looking at the whole context of the deed, whether the bills that related to the partnership of *Easterby* and Co. were to be discharged; and whether these qualifying words would not authorize the Court to say, that if there are other demands not relating to the partnership, it is not the intent of the deed that they should be discharged." His lordship afterwards (a) sums up the case in these words: "The first question here is, are these bills of *Slade* in the hands of the *Kensingtons*? Are they bills for debts due and owing to them respectively from *Easterby* and Co.? They are not. They are not such bills as are described in the former part of the deed. As they do not fall within even the description of the bills that were to be delivered up, does not the question come to this?—what they have engaged, or have not engaged, to deliver up by executing this instrument? I am of opinion they meant to discharge all debts due on account of this partnership. Have they, or have they not, by this deed, released any bills of exchange, in respect of any debts due, but by *Easterby* and Co.? I think they have not. To put it in another way—If they did mean to discharge any other debts, it must be by some other means, and not by any of the clauses or provisions of this deed. This deed, in my judgment, meant to discharge the debts of *Easterby* and Co. in reference to the mining

(a) 1 Buck, 599.

concern. It proceeds upon calculations that there would be sufficient to pay every body who had any demands on the mining concern, because the creditors seem to me to have had the caution to say,—should you mean any thing more than to discharge the debts of the mining concern, we beg to have a reservation against names which are other names than those of *Easterby* and Co., as acceptors, in our possession. And then the question is, was it not competent for them to make that bargain, and for the other party to accept it? My opinion is, that it was competent for the parties to make the bargain they have entered into, and therefore I can see nothing to prevent the assignees of the *Kensingtons* from taking the benefit of those acceptances of *Slade*." Those observations, and the general principles upon which they are founded, are expressly applicable to the present case, both as respects *Lewis's* acceptance, and the conveyance of the Bankside estate; and must decide the present question in favour of the defendants. The construction there put upon the deed is the very construction which the plaintiffs themselves have put upon it, for they have paid *Kensington* and Co. money on account of the very demand, which they now contend was released by the deed. By that act they gave judgment against themselves upon this question, and they are estopped from using the only arguments upon which they could possibly rely.

F. Pollock, in reply. The argument last urged, with respect to the payment on account made by the plaintiffs to *Kensington* and Co., has, no weight; because that was a conditional payment only, subject to the question of the operation of the deed, and the extent of that operation. Looking at the deed altogether, it seems clear that the intention of all parties was, to extinguish the debt from *Easterby* and Co. to *Kensington* and Co., and that the deed was effectual to accomplish that object. One of the clauses of the deed, as pointed out by Lord *Eldon* in his judgment

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in *Es parte Carrington* (a), seems quite decisive of the point; for it is, "that the several provisions so imposed on the made, are respectively intended to be, and shall be accepted and taken, by whom? By the several and respective creditors of the said co-partnership, in full satisfaction and discharge of what? Of their respective debts and demands, as well against *Easterby* and Co., and the *Bull*, or against the estate of the said *John Bull*, or against the said Messrs. *Atkinson* and *Moss*, respectively."

Cur. adv. vult.

Judgment was now delivered by Lord TENTERDEN, C. J., who, after shortly recapitulating the facts of the case, thus proceeded: "The question for our opinion was, whether the plaintiffs were entitled to recover the surplus of 186 N. 8s. 10d. from the defendants. The plaintiffs' claim to recover is founded upon the supposed effect of the deed of arrangement executed for the payment of the debts of *Easterby* and Co. It appears that *Kensington* and Co. refused to execute that deed until they received from the plaintiffs a written assurance, that by so doing they should not prejudice their security on the premises lately belonging to the bankrupt *Bull*, at *Burkhead*. The greater part of the money now claimed by the plaintiffs was the produce of that security. It was contended on their part, that this assurance was intended only to relate to the claim on these premises as a security for the cash balance due to *Kensington* and Co. from *Bull*; but we think it is impossible to understand it in this narrow view, because the deed has not the slightest connection with or relation to that fact. If, therefore, the execution of this deed shall have the effect which the plaintiffs now contend for, *Kensington* and Co. and the defendants, who represent them, may have great reason to complain that they have been deceived. Still, if this be the legal operation of the deed, we, as a Court of law, are bound to give that effect

(a) 1 Buck, 591.

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relying thereon, of opinion, however, that the deed has not that effect, it is material to consider what the situation of Kensington and Co. on the one hand, and of the plaintiffs on the other, was, before the execution of the deed. Now, Kensington and Co. were the holders of bills of exchange to and amount exceeding 18,000*l.*, drawn by *Easterly* and Co., and accepted by *Ellill*, and which had been deposited with them by *Atkinson* and *Mount*, as security for money advanced. They had, therefore, a right to prove those bills against the estate of *Ellill* under his commission. They were also the legal proprietors of the lease of the premises at Bankside, which had been conveyed to them by *Ellill*, with a power of sale; and they were holders of certain bills of exchange accepted by *Slade*; and of one bill of exchange accepted by *Lewis*. The Bankside premises had been conveyed, and the bills of exchange had been deposited, by *Ellill*, as a security not only for the cash balance that might be due from *Ellill*, but also for the payment of any bills of exchange bearing his name of which Kensington and Co. might by any other means become the holders. The bills to the amount of 18,000*l.* were of this description. The Bankside premises and the bills accepted by *Slade* and *Lewis*, were placed in the hands of Kensington and Co. as a security; but it does not appear of what precise value those securities might be. If the value of the whole, above the amount of *Ellill's* cash balance, be taken at 5,000*l.* or 6,000*l.*, at which it will probably be not under-rated, that would leave them entitled to prove, on the narrowest and strictest view, for 18,000*l.* or 19,000*l.* It must, therefore, have been desirable to those who had the management of *Ellill's* affairs, and an interest in his funds, to relieve his estate from the proof on those bills; and this sufficiently accounts for the desire manifested by the plaintiffs that Kensington and Co. should execute the deed in question. By executing it, they really consented to give up, and did, in fact, give up, the bills for 18,000*l.* The estate was thereby absolutely

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relieved from that proof, and *Kensington and Co.* took the chance of the produce of the estate of *Easterby and Co.* under the deed, in the place of their right to a dividend under *Ellill's* commission. The bills, to the amount of 18,000*l.* had been accepted by *Ellill* for the accommodation of *Easterby and Co.* There were various complicated dealings between those parties, and when the deed was made, it was unknown in whose favour the balance would be ultimately found to be. The deed contains a provision for paying to the assignees of *Ellill* a dividend out of the first portion of the fund, on the money that was then actually received by *Kensington and Co.*, and the other persons therein named, out of the estate of *Ellill*; and a provision for a payment to be made out of the second or collateral fund of 18,600*l.* of the balance that might ultimately be found due to *Ellill's* estate. The deed is of itself of very unusual length, and very multifarious. There is an abstract of it sufficient for the purposes of this cause in Mr. *Buck's* report of the case, *Ex. parte Carstairs*, before my Lord *Eldon* (a), and I do not think it necessary to repeat the detail of its provisions. It is clear that the great and primary object was the payment of the debts of *Easterby and Co.*, and the relieving them from the pressure of the creditors. It is not clear that the execution of this instrument referred to any claim which did not furnish a direct charge against them. There were many bills of exchange outstanding, which did furnish such a charge against them, and also against some other persons, and Messrs *Puller*, who had put their names to bills which had been sent abroad for the debts, or on account of *Easterby and Co.* These two gentlemen, Messrs. *Puller*, were to take a part in the whole arrangement, both in the sale and the purchase; and accordingly their names are mentioned in the clause of release by the creditors of *Easterby and Co.*, although neither *Atkinson and Mount*, nor the estate of *Ellill*, are mentioned in that clause. They are mentioned in some of the recitals,

(a) 1 *Buck*, 560.

but not in that clause; and, as it was said by Lord *Eldon*, in whose judgment we entirely concur, it will not be found, on an attentive perusal of the deed, that any bills of exchange are stated as intended to be given up, except those which constituted the debts due and owing by *Easterby* and Co., of which description were the bills for 18,000*l*. Nothing is said of any bills of the description of those accepted by *Slade* and *Lewis*. There is nothing express to prevent the holders of such bills from availing themselves of them, although by so doing a remote and circuitous charge might eventually arise against *Easterby & Co.* *Slade's* bills were the subject of the case before Lord *Eldon*. They are not distinguishable from *Lewis's* bill, mentioned in the present case; and his lordship's judgment is, therefore, a direct authority in favour of the defendants as to that part of the case. In principle, also, it is an authority in their favour on the other parts of the case; for if the collateral security of a bill of exchange was not lost by the operation of the deed, and by the giving up of other bills, for the payment of which it was a security, neither would this other security be lost by the operation of the deed. There can be no difference in principle between the one and the other. It may not be unreasonable to presume that many of the creditors of *Easterby* and Co., who were willing to give up bills of exchange, and to release them, if they were allowed to retain their collateral securities, would have refused to do so if they had not been allowed to retain such securities. Any attempt to deal with such securities would probably have been found impracticable, and would have defeated the whole scheme of arrangement, which the parties most probably were sanguine enough to think likely to provide a fund sufficient in the end to meet all demands, present and contingent. The assignees of *Ellill* may well be supposed to have been content with the chance of reimbursement of such sum as *Kensington* and Co. might obtain, by reason of their collateral securities, out of the secondary fund, on the final settlement of the accounts between them and *Easterby* and Co.; and to have preferred an arrangement which left in

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the hands of *Kensington* and Co. the collateral securities only, to the then existing state of things which gave them not only those collateral securities, but also the right of proof and dividend for a further sum. For these reasons we are of opinion that the plaintiffs are not entitled to recover, and, therefore, that judgment of nonsuit must be entered.

Judgment of nonsuit (a).

(a) In general, a creditor who by any contract which can be enforced against him (Mann. N. P. Digest, *Assumpsit*, pl. 1; *Surety*, pl. 1; *Variance*, pl. 42,) at law or in equity, gives time to his debtor, discharges the surety; for if, notwithstanding such contract, it were competent to the creditor to sue the surety, the latter would immediately have his remedy over against the debtor; this would be in

fraud of the contract of forbearance, which the creditor would thereby indirectly defeat; but where the debtor assents to the reservation of the right to resort to the surety, he cannot complain: he has not obtained an absolute discharge, for which he never contracted. And see *Boulbee v. Stubbs*, 18 Ves. 21; *Bank of Ireland v. Baresford*, 5 Dow, 234.

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After judgment by default and writ of inquiry executed, the defendant cannot enter a suggestion under the Middlesex County Court Act, 23 Geo. 2, c. 33, to deprive the plaintiff of costs.

THE plaintiff had brought an action of *assumpsit* against the defendant, in which the latter had suffered judgment to go by default, and upon the execution of the writ of inquiry the jury assessed the damages under forty shillings.

Hill moved for a rule nisi for entering a suggestion on the roll pursuant to the Middlesex County Court Act, 23 Geo. 2, c. 33, s. 19 (b), to deprive the plaintiff of costs. It has undoubtedly been held in one case of *Harris v. Lloyd* (c), that the defendant is not entitled to the benefit

(b) Which enacts that in any actions of debt or *assumpsit* brought in any of the superior courts against a defendant residing in Middlesex, and liable to be sued in the county courts, where the jury upon the trial of such cause shall find damages for the plaintiff under forty

shillings, unless the judge shall certify, &c., no costs shall be awarded to the plaintiff, &c.

(c) 4 M. & S. 171. It should seem that if this act, like the London Court of Requests Act, 39 & 40 Geo. 3, c. 104, s. 12, contained the additional words, or otherwise,

of this act after judgment by default and writ of inquiry, but only where there has been a trial; but it is submitted that the point is deserving of further consideration. In *Barnes v. Tibb* (a), it was decided that the Southwark Court of Requests Act, 22 Geo. 2, c. 47, could not be pleaded to an action brought in a superior court; but that the proper mode for the defendant to avail himself of it, was by entering a suggestion on the record, after verdict, or the execution of a writ of inquiry. Now the words of that act are, "that if in any action, &c. for recovery of any debt sued against any person (within the jurisdiction) in any of the king's courts, &c., it shall appear to the judge or judges of the court where such action shall be sued, that the debt to be recovered by the plaintiff does not amount to forty shillings, and the defendant shall duly prove by sufficient testimony," that he is liable to the jurisdiction of the inferior court, the plaintiff shall pay costs to the defendant; words which seem as strongly to allude to a verdict after trial as the words, *where the jury upon the trial of such cause shall find*, &c. in the Middlesex County Court Act; neither of them being followed by the qualifying words, *or otherwise*, upon which the distinction has in some cases been held to turn (b). The two cases appear somewhat at variance, and therefore the question seems to require further consideration.

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Lord TENTERDEN, C. J.—I think we ought to act upon the authority of the case of *Harris v. Lloyd* (c), and grant no rule in this case. It was there decided by this Court, that

it would extend to a verdict on a writ of inquiry. That act provides that if any action be commenced out of that court for any debt not exceeding 5*l.*, against any person, (within the jurisdiction,) the plaintiff shall not, *by reason of a verdict for him, or otherwise*, be entitled to costs; upon which it has been held, that after judgment by default, and damages assessed upon a writ of inquiry, the defendant may come into court and move to stay proceedings on payment of the damages without costs. *Dunster v. Day*, 8 East, 239; and see *Cornforth v. Lowcock*, ante 321, 322, n. and cases there collected.

(a) 2 H. Bl. 351.

(b) *Ante*, 562, note (b).

(c) 4 M. & S. 171. And see *post*, 566.

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a suggestion cannot be entered under this act of parliament, in order to entitle the defendant to double costs, after judgment by default and writ of inquiry, but only where there has been a trial. I am of opinion that that was a right decision; and I consider it much better to act upon it in the first instance, than by granting a rule to shew cause, to unsettle the question.

The rest of the Court concurred.

Rule refused.

ANSTER v. LIDEY.

Under the St. Alban's Court of Requests Act, 25 Geo. 2, c. 38, defendant must plead his residency within the liberty; and if he omit to do so, he will not be allowed to enter a suggestion to deprive the plaintiff of his costs where the verdict is under 40s.

ASSUMPSIT for the use and occupation of a stable, for goods sold and delivered, and on the money counts. *Plea, non assumpsit.* At the trial before Lord Tenterden, C. J., at Guildhall, at the adjourned sittings after last Trinity Term (a), the plaintiff obtained a verdict for 17. 1s. on the count for goods sold and delivered, but failed to establish any further claim. In the following term the defendant obtained a rule calling upon the plaintiff "to shew cause why a suggestion should not be entered upon the record, that at the time of the commencement of this action the defendant was liable to be summoned to the Court of Requests for the borough of St. Alban's, in the county of Hertford, and the liberty thereof, for the sum found by the jury for the plaintiff on the trial of this cause, pursuant to the statute of the 25th year of king Geo. 2, c. 38, the said sum not having been so found for or in respect of any debt for rent upon any lease of lands or tenements, or any other real contract, or for or in respect of any debt arising by reason of any cause concerning testament or matrimony; and why the verdict should not be entered up for the plaintiff for the said sum alone without costs." This rule was obtained upon the affidavit of the defendant's attorney, stating that at the trial a verdict had been found for the plaintiff for the sum of 17. 1s. only for goods sold and money lent. By 25

(a) Counsel for the plaintiff, *Chitty*; for the defendant, *Garvey and Busby*.

Geo. 2. c. 38. it is enacted, "that if, in any action of debt, ~~or action on the case upon an assumpsit for recovery of any debt, to be sued and prosecuted against any person or persons aforesaid, in any of the king's courts at Westminster or elsewhere, out of the said Court of Requests, the plaintiff shall declare for any sum of money not amounting to the sum of 40s., the defendant may plead generally, in lieu of such action, that at the time of commencing such action the defendant was inhabitant and resident within the said borough of St. Alban's, or the said liberty of St. Alban's, or any part thereof, and was liable to be warned or summoned before the said Court of Requests, without pleading any other matter specially. And in case the plaintiff in any such action shall declare for the sum of 40s., or any sum of money not exceeding 40s., the defendant may plead generally, over and above such matters as aforesaid, that the defendant was not at the time of commencing such action indebted to the plaintiff in any sum or sums of money amounting to the sum of 40s. without pleading any other matter specially; whereto the plaintiff shall or may reply generally, and deny the matters pleaded as aforesaid; and if the plaintiff be nonsuited or discontinue his action, or verdict pass against him, or judgment be given on demurrer, the defendant shall have full costs; provided always, that it shall and may be lawful to and for the said plaintiff in such action afterwards to prosecute the said defendant for the recovery of his or her said debt in the said Court of Requests, any thing hereinbefore contained to the contrary thereof notwithstanding."~~

Chitty now shewed cause. Where the debt is laid in the declaration under 40s., a defendant who wishes to avail himself of 25 *Geo. 2. c. 38.* is simply to plead his residence and liability. If the debt is stated at above 40s. the defendant must also plead that the debt is under 40s. When an act says that no action shall be brought, it need not perhaps be put upon the record; but the objection should be taken at the trial. Here, however, at the trial, the de-

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defendant relied only on the statute of *Elizabeth* (a). In *Taylor v. Blair* (b), the Court held, with reference to the Westminster Court of Requests Act, that if the defendant omitted to plead his exemption, a suggestion could not be entered on the record, nor could the proceedings be stayed. It is fair and just that he should put this on the record, and not take the party by surprise: *Harris v. Lloyd* (c). *Taylor v. Blair* is confirmed by *Parker v. Edding* (d), in which case it was held, that where the statute gives the plea, it seems to require that the matter shall be put on the record.

Gurney and Busby, contra. All the parties resided within the jurisdiction of the liberty of St. Alban's. The defendant may come at any time before judgment, and shew that the plaintiff has disobeyed the law. In *Taylor v. Blair* (e) Lord Kenyon says, perhaps the defendant might have availed himself of the objection at the trial. Here the defendant was not aware of the act at the time of the trial (f). The plaintiff is not in a worse state than if the

(a) 43 *Eliz.* cap.6.

(b) 3 T. R. 452.

(c) 4 M. & S. 171; *ante*, 562, 3.


(d) 1 East, 352.

(e) 3 T. R. 452; *ante*, 565.

(f) The defendant was not ignorant of the fact of the residence within the liberty, and his ignorance of the statute, which is declared (sect. 24) to be a public act, would not avail him; for *ignorantia legis neminem excusat*. *Bilbie v. Lumley*, 2 East, 471; *Williams v. Bartholomew*, 1 B. & P. 332; *Stevens v. Lynch*, 12 East, 38; *East India Company v. Triton*, 5 D. & R. 214, 3 B. & C. 280, 290. This rule is borrowed from the civil law, (D. lib. 22, tit. 6,) without, however, adopting with it those equitable modifications by which the rule was originally accompanied, some of which

it may be proper to state. "Juris ignorantia non prodest acquirere volentibus, suum vero petentibus non nocet," D. 22, 6, 7; or, as it is expressed by the commentators, "Juris error, ubi de damno evitandò agitur, non nocet: ubi de lucro captandò, nocet: error facti neutro casu nocet." "Minoribus 25 annis jus ignorare permissum est: quod et in fœminis in quibusdam causis propter sexum infirmitatem dicitur; et ideo, sicubi non est delictum, sed juris ignorantia, non læduntur:" D. 22, 6, 9. And see Pothier, *Traité de l'Action, Condictio indebiti*, part. 2, sect. 2, art. 3. In *Vernon's case*, *Méchi* 20 Hen. 7, fo. 2, pl. 4, the defendants justified taking away the plaintiff's wife, on the ground that they were accompanying her to Westminster, to sue for a divorce in case

objection had been taken at the trial. [Lord Tenterden, C. J. Here you apply for a suggestion, not for a nonsuit.] In *Shaddick v. Bennett* (a) it was held, that the sum recovered is to be considered the debt for which the action is brought. That was a case upon the London Court of Requests Act (b). But the Lord Chief Justice there says, "the language of the statutes, from which these Courts of Requests derive jurisdiction, certainly varies, but they have all one common object, and should, therefore, all receive a similar construction" (c).

1828.

 ANNEA
 v.
 JULY.

LORD TENTERDEN, C. J.—This is an application to enter a suggestion under 25 Geo. 2, c. 38. *Taylor v. Blair* seems to be precisely in point. There the words are as absolute as the present. They are precisely the same in both respects. If we were to over-rule that case, our own decisions might in like manner be over-ruled by our successors. You chuse to resist the action, and ought to pay the costs.

The other Judges concurred.

Rule discharged.

of her conscience. It was objected to the plea, that the defendants ought to have taken her to the ordinary or the metropolitan; but the plea was held good, "for perhaps they had not knowledge of the law as to where the divorce should be sued." And see *Manser's* case,

2 Co. Rep. 4; Doctor and Student, book 2, cap. 46, 47; *Eichhorn v. Le Maître*, 2 Wils. 368.

(a) 7 D. & R. 229; 4 B. & C. 769.

(b) 39 & 40 Geo. 3, cap. 104, sect. 12.

(c) 7 D. & R. 232.

BRADLEY v. GOMPERTZ.

THIS was a rule calling upon the plaintiff to shew cause why the writ of *fi. fa.* and execution thereon should not be set aside for irregularity, with costs, the alleged irregularity being that execution was sued out upon the judgment,

Sham bail in error may be treated as a nullity, and execution may issue.

1828.
BISHOP
v.
GOWDERT.

After the allowance of a writ of error, under which bail in error had been put in, which had not been accepted, the bail was ordered to be put in to show a *divit* (a writ of error). *R. R. Richardson* shewed cause, upon an affidavit stating that the bail were hired; that they were paid in the employment of the tipstaff; that they had received money, the one 5s and the other 4s. 6d., for becoming bail; that one of them had recently before been discharged under the Insolvent Act, and that the other had been bail fifteen times in the present, and five times in the last term, and contended that, under such circumstances, the plaintiff was entitled to treat the bail as a nullity, and to sue out execution. He cited *Ward v. Levi* (a) as a decision of this Court expressly in his favour; and one which had been confirmed and acted upon by the Court of Common Pleas in the case of *Browne v. Brown* (b).

W. Clarkson, contra. The facts stated on the other side may be true, but the defendant has had no opportunity of answering them. Assuming that they are true, then, according to the authorities cited, it must be admitted, that the bail would not operate as a stay of execution. But the

(a) 2 D. & R. 421; 1 B. & C. 268. There, hired bail, who were insolvent, of whom notice had been given, and to whom no exception was entered, became bail in error. The plaintiff, treating the writ of error and the bail as a nullity, entered up judgment, and took out execution. It was held that the execution was regular; and this Court discharged a rule for setting it aside, with costs.

And see *Crum v. Kitchen*, H. T. 1820, 2 D. & R. 421, n., where, upon a similar motion, *Bayley*, J. observed, that upon *nemo* process the plaintiff had the security of the sheriff or the bail-bond, but in error he had no security but the

bail, who were answerable, not for the person of the defendant, but the actual payment of the debt; and he declared that as no error was suggested on the record, such bail being put in to a writ of error was a gross fraud upon the Court and its suitors; and though the rule did not ask for costs, yet, to mark the sense which the Court entertained of such disgraceful practices, the rule should be discharged with costs.

(b) 4 Bingh. 68, where the Court of Common Pleas held, that if hired bail be put in on a writ of error, the plaintiff may issue execution.

plaintiff has no right to take the remedy into his own hands, and to treat the bail as a nullity. He ought to have served the plaintiff with a rule for better bail, or to have applied to the Court for leave to sue out execution, upon an affidavit suggesting the facts, which the defendant would then have had an opportunity of answering. This view of the subject has recently been taken by Bayley, J. on a similar application, made before him at chambers, and in which that learned judge, under circumstances very like the present, set aside the execution. [Bayley, J. I certainly do not recollect making the decision attributed to me, though I may have done so, and the circumstance have escaped my memory. But I am quite sure that if I did so decide, the cases cited to-day were not brought before my notice.]

1828.

BRADLEY
v.
COMPARTZ.

LORD TENTERDEN, C.J.—I think the decisions of this Court and of the Court of Common Pleas upon this subject, to which we have been referred, are perfectly correct, and that we are bound to act upon them in this case. The reason given by the Court of Common Pleas is a very good one, namely, that the plaintiff, in issuing execution, acts at his own peril; for if what he does is called in question, he must shew, beyond all doubt, that the bail are hired. Here he has done so. It is certainly a gross fraud upon the Court for a defendant to put in such bail; and I think the plaintiff in justice ought to be allowed to treat them as a nullity. I am, therefore, of opinion that this rule should be discharged with costs.

BAYLEY, J.—I am entirely of the same opinion. The decisions upon the subject seem to me perfectly right, and I think the general rule ought to be so laid down.

The other Judges concurred.

Rule discharged with costs.

1886;

In an action against the marshal for an escape, the Court will compel the marshal to grant an inspection of the *habeas corpus* and *commititur*.

Fox v. Jones, Esq. and another.
 THIS was a rule calling upon the defendants the Marshal and the Clerk of the Papers of the King's Bench Prison, to shew cause why they should not produce to the plaintiff and suffer him to take copies of a writ of *habeas corpus* and a *commititur*, relating to a prisoner who had escaped, and of whom the plaintiff was a creditor. It appeared upon the affidavit on which the rule was granted, that the plaintiff had brought an action against the marshal for the escape of the prisoner; that in the course of the proceedings against the prisoner, a writ of *habeas corpus*, touching his custody, had been sued out, which, with the *commititur*, were afterwards lodged with the Marshal, and by him committed to the custody of the Clerk of the Papers of the prison; that it being necessary in the course of the present action to obtain a sight of these documents, the defendants had been applied to, to produce them, and allow copies of them to be taken, but had refused to do so, whereupon this rule was obtained.

Scarlett and Campbell shewed cause. This application cannot be granted, for the Marshal cannot be compelled to furnish evidence against himself, which this rule calls upon him to do. He ought not, in that respect, to be placed in a worse situation than other defendants. Nor is it necessary for the plaintiff's interest that the Court should interfere in the way proposed, because he may proceed as other plaintiffs do, by serving the Marshal with a notice to produce these documents at the trial, and in the event of his failing so to do, by giving parol evidence of their contents. The case of *Cooper v. Jates* (a) is decisive against the present application, where this Court refused to compel the Marshal to file a writ of *habeas corpus*, for the purpose of facilitating an action brought against him for an escape.

(a) 2 M. & S. 208.

F. Pollock, contra. A sight of these documents is necessary for the purposes of justice; therefore the Court will compel their production. They are part of the proceedings in this Court, kept by the Marshal by virtue of his office, and for the safe custody of which he is responsible. This is a very different case from that of *Cooper v. Jones*. There the plaintiff called upon the Marshal to file the writ of *habeas corpus*, and the Court refused the application on the ground that there was no place in which it could properly be filed except the office of the Clerk of the Papers, in the prison, the writ forming part of the authority of the Marshal for detaining the prisoner. Here no attempt is made to change the place of custody of the writ; all that is prayed for is an opportunity to inspect and take a copy of it, in order that it may be correctly set out in the declaration.

Lord TENTERDEN, C. J.—This case is perfectly distinguishable from *Cooper v. Jones*. The motion there was for the Marshal to file the writ, and it was refused upon the ground that there was no proper place in which, consistently with his own safety and with his duty, he could file it. Here the application is only to produce the writ, so that the plaintiff may inspect and take a copy of it, for the purpose of maintaining his action for the escape of his debtor. I think that is a perfectly just and reasonable application. It is clear that the Clerk of the Papers must produce the writ at the trial, if served with a *subpoena duces tecum* for that purpose; and as it may be necessary for the plaintiff to set out the writ in his declaration (a), I see no reason why he should not be allowed an inspection of it for that purpose in the present stage of the cause.

The other Judges concurred.

Rule absolute (b).

(a) And see *Langslow v. Cox*, J. B. Moore, 778, where, in an action against the Warden of the

(b) But see *Davies v. Broom*, 9 Fleet, for the escape of a prisoner

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Fox
v.

Jones

1832.

Fox

v.

JONES.

committed to his custody in execution, the Court of Common Pleas held, that the party at whose suit he was committed could not call for an inspection of the writ of *habeas corpus*, and return thereto, or of the *committitur*; and that the warden was not bound to furnish copies of them, as all the proceedings under which a prisoner is charged in his custody, are incorporated in the list of causes under which he is detained, and which are deposited with the Clerk of the Papers of the prison.

Ex parte CHARLES BAGSTER.

On a question of the legality of the commitment of a witness by commissioners of bankrupt, all the questions and answers must be looked at as forming one examination: and a witness cannot be committed for not answering as to his *belief* of the *intention* of the bankrupt, unless other parts of his examination shew such belief to be material with reference to the person, trade, dealing, or estate of the bankrupt.

ARCHBOLD had obtained a writ of *habeas corpus* to bring up the body of *Charles Bagster*; for the purpose of discharging him out of custody, he having been committed to prison by the commissioners appointed under a commission of bankrupt issued against his brother, *William Bagster*, of Norwich, draper, under the following circumstances:

The prisoner had been committed by the commissioners, under the authority of the statute 6 Geo. 4, c. 16, ss. 33 and 34 (a), for not giving satisfactory answers in his examination.

(a) By the 6 Geo. 4, c. 16, s. 33, commissioners of bankrupt are empowered to summon before them "any person whom the commissioners believe capable of giving information concerning the person, trade, dealings, or estate of such bankrupt, or concerning any act or acts of bankruptcy committed by him, or any information material to the full disclosure of the dealings of the bankrupt; and to require such person to produce any books, papers, deeds, writings, or other documents in his custody or power, which may appear to the commissioners necessary to the verification of the deposition of such person, or to the full dis-

closure of any of the matters which the commissioners are authorised to inquire into," &c.

By s. 34, it is provided, that "if any such person shall refuse to answer any *lawful* questions put to him by the said commissioners touching any of the matters aforesaid, or shall not fully answer to the satisfaction of the said commissioners any such *lawful* questions," the commissioners may commit such person to such prison as they shall think fit, there to remain without bail, until he shall full answers make to their satisfaction, to all such *lawful* questions as shall be put to him.

And by s. 39, it is provided,

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Ex parte
BAGSTER.

tion before them touching his brother's affairs. The warrant of commitment set out the whole of the examination of the prisoner before the commissioners. On his first examination, the prisoner being asked whether he had not written to one *Gissing*, the bankrupt's shopman, respecting a statement of the bankrupt's debts and assets, he denied that he had. On a subsequent examination he desired leave to correct that answer, and stated that he believed he had written to *Gissing* on that subject. He then also desired to correct another answer which he had previously given. He had before stated that he had not received any goods from the bankrupt's stock since the 8th of August, 1827; he now stated that he had received goods from the bankrupt since that time, to the amount of 42l. 8s. He admitted that he had struck the docket against his brother. Being asked whether he had seen the bankrupt between the time of his writing to *Gissing* and striking the docket, he answered, that he could not say,—he thought it probable he had,—he believed he had;—if he had seen him, it was at *Ipawich*; he thought it was at *Ipawich*, with *Mr. Marston*, the attorney. Being asked whether that was not after the time when he wrote to *Gissing*, and before the bankrupt absconded, he answered, yes. Being asked why he did not state that before, he said, it was because he did not recollect it. The examination then proceeded thus:—

“ Now, state what passed at that interview between you. *Mr. Marston* came over to strike the docket.

“ that if any person committed by the commissioners shall bring any *habeas corpus*, in order to be discharged from such commitment, the court or judge before whom such party shall be brought by *habeas corpus*, shall, if required thereby by the party committed, in case the whole examination of the party so committed shall not have been stated in the warrant of commit-

ment, inspect and consider the whole of the examination of such party, whereof any such question was a part; and if it shall appear, from the whole examination, that the answer or answers of the party committed is or are satisfactory, such court or judge shall and may order the party so committed to be discharged.”

1770

*Ex parte
Barnard*

The question repeated.

Nothing of importance passed between my brother and myself.

State what did pass, relative to his circumstances, whether important or not in your view of it; state the whole truth.

I have stated that the attorney came over to strike the docket.

You are requested to state what passed between your brother and you relative to his circumstances.

Nothing.

You have before said, nothing important passed: state what did pass.

I now mean to say nothing at all passed.

For what purpose did your brother then come over to you?

I suppose to drive Mr. Marston, the attorney, to Ipswich, where I lived.

Do you not know that your brother did go from Norwich to Ipswich with Marston to you, for the purpose of getting you to strike a docket?

Mr. Marston would have done as well alone.

Have you any other answer to give to that last question?

No.

It is pointed out to you that you have not answered it; have you any other to give?

No.

You are requested carefully to consider, as it is a question easily to be answered.

I can give no other answer. My brother might have had business at Ipswich, although not with me.

The question repeated.

I have no other answer to give.

The question repeated.

If he did, it was unknown to me.

Do you not believe that your brother went with Marston

from Norwich, to yourself at Ipswich, to get you to strike a docket.

I do not know if he did or not: I do not know his intention in coming.

You are not asked as to your knowledge, but as to your belief.

I would have answered the question long ago—

Answer it now as to your belief.

I do not know what to say.

Is that the only answer you mean to give?

Yes.

Having had time for reflection, have you any addition to make to your examination?

No."

The warrant then stated that these answers not being satisfactory, the commissioners did thereby commit the prisoner to Newgate, there to be kept without bail, until he should submit himself to answer the questions to their satisfaction.

Scarlett and Archbold, on behalf of the prisoner. The commitment was not justifiable. The questions, for the not answering of which the prisoner was committed, were not within the scope of the authority of the commissioners to put, for they did not "concern the person, trade, dealings, or estate of the bankrupt," nor were they "material to the full disclosure of the dealings of the bankrupt;" to which subject-matter the power of examination vested in the commissioners is confined. The prisoner, therefore, was not bound to answer such questions at all; and though it must be admitted that some of his answers are not very satisfactory, still he ought not to have been committed. The particular questions, at the close of the examination, upon the answers to which the commitment appears mainly to have proceeded, were still more objectionable. They were neither fair nor legal questions, nor had they any relevancy to the subject under inquiry. No man is bound to

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Barnard

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BAGSTER.

answer as to his mere belief of the intention of another person. Upon what facts can such a belief be founded, and what effect could it have had in this case upon the matter under investigation? The answer, if it had been ever so fully given, would not have been admissible as evidence, one way or the other, in any court before which the fact of the bankrupt's situation could be made the subject of inquiry.

Law and Knight, contra. First, it is quite immaterial whether the questions put at the close of the examination were relevant and legal or not, and it is equally immaterial whether the answers given to them were satisfactory or not, because previous questions had been asked which were clearly legal and relevant, to which answers had been given which were clearly unsatisfactory: therefore the commissioners, looking at the examination altogether, which they were entitled to do, were justified in committing the prisoner. For all these positions the case of *Ex parte Vogel (a)* is an express authority. It was there held, under circumstances very similar to the present, that the true criterion by which to judge as to the propriety of the commitment of a witness by commissioners of bankrupt, was to consider all the questions and answers collectively, and then to say whether the whole examination was satisfactory or not; and that though the commissioners in their warrant set out several questions, to some of which, taken alone, the answers were satisfactory, that was no objection to a warrant committing the witness till he should answer satisfactorily to particular questions put to him, and which he had not answered satisfactorily. The Lord Chief Justice, there observed, that the only way to come to a proper conclusion was to look at all the questions and answers collectively, and to consider them as constituting one entire examination; and the prisoner in that case was remanded, because the result of his examination, so considered, was

(a) 2 B. & A. 219.

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BAGSTER.

unsatisfactory, though his answers to some of the questions put to him were satisfactory. Secondly, the questions as to the prisoner's belief of the bankrupt's intention in going to Ipswich, were relevant, fair and legal questions. In the case already cited, a witness was asked questions as to when and where he had last seen the bankrupt's wife; and it was held that they were legal and material questions, and that the commissioners were justified in committing him for giving unsatisfactory answers. In *Miller's case* (a) it was held, that the statement of a witness that he could not positively recollect a fact, but should rather believe the affirmative, was a full and satisfactory answer: therefore, if belief constitutes a satisfactory answer, it follows that inquiry into the belief of a witness forms a legal and proper question. Besides, the other parts of the examination in this case shew that the questions objected to were proper questions. The prisoner had admitted that he, the bankrupt's brother, had struck the docket against him, and that he had received goods from the bankrupt after he had inquired into the state of his debts and assets; so that there was very good reason for asking what had passed between them immediately previous to the docket being struck, and what was the bankrupt's intention in making the visit to his brother: and nothing could have been more easy, had the prisoner been inclined to act openly and honestly, than to answer that inquiry fully and frankly. Thirdly, the prisoner's answers to some questions, looking at the examination as a whole, were decidedly unsatisfactory, and perfectly justified his commitment. An inclination to fence and shuffle with the questions, to evade explanation, and to suppress truth, is apparent through his whole examination; and to one question in particular he returned an answer which it was utterly impossible for any human being to believe. He at last declared that nothing at all passed between him and the bankrupt at the meeting

(a) 2 W. Bla. 881.

1868.

*Ex parte
BAGGINS.*

at Ipswich, though he had previously stated that nothing of importance passed, admitting clearly that *something* passed. Therefore, that *nothing* passed at that meeting, no man could believe; and the commissioners were not bound to believe it, contrary to their own common sense and understanding, merely because the prisoner swore it. Trying the case, then, by the test proposed in *Ex parte Vogel*, and looking at the examination as a whole, the answers of the witness were clearly unsatisfactory, and the commissioners were justified in committing him.

Lord TENTERDEN, C. J.—This is an extremely important question as regards the powers and the duties of commissioners of bankrupt, and we will take time to confer together, and deliberate upon the subject, before we express any opinion on the case.

Cur. adv. vult.

The judgment of the Court was afterwards delivered by Lord TENTERDEN, C. J., who, after stating the nature of the case and the substance of the examination, thus proceeded:—We have conferred together upon the point raised in this case. Looking at the whole of the examination together, it is quite clear that it was, generally speaking, a proper examination, and that the prisoner was not at all inclined to make a full and fair statement of the facts within his knowledge. To one of the questions asked him, relative to what passed between himself and the bankrupt at their interview at Ipswich, he at last gave a direct negative, having previously given to the same question a qualified affirmative. His language throughout shews that his object was to evade inquiry. But we think the answer to the last question, upon which the prisoner was committed, did not justify his commitment, because the question itself was not of a nature to call for a more explicit answer. The question was, what was the prisoner's belief as to the

intention of his brother in going to Ipswich. Now there is nothing in the previous parts of the examination to shew that the prisoner's belief upon that point was material to any of the objects of the commission, or to any of the matters within the jurisdiction of the commissioners. What the prisoner might believe upon that subject is not made to appear to have any relation to the person, the trade, the dealing, or the estate of the bankrupt. It may, in point of fact, have had such relation, and that fact might have been made to appear by other preliminary questions. A series of questions might have been put to him, so as to shew that his belief with respect to his brother's intention was material with reference to his own subsequent conduct; and the commissioners were undoubtedly entitled to ask him questions, his answers to which would render him liable to the bankrupt's estate in a civil action. But there does not appear upon the face of the examination enough to shew that the commissioners had that object in view; and that the prisoner's belief as to his brother's intention was material to the attainment of that object. The mere belief of a witness, or of any party, as to the purpose or intention of another party, is, generally speaking, not evidence, because it is in itself a matter of perfect indifference, unless it is shewn by previous circumstances to be of importance. Looking at the examination as a whole, we are not surprised that the commissioners thought themselves called upon to commit the prisoner; but, for the reasons I have stated, we think they were not justified by law in so doing, and therefore that the prisoner ought to be discharged.

Prisoner discharged.

1826.

Ex parte
BAGSTER.

1828.

A second commission of bankrupt issued pending a former commission, under which the bankrupt had not obtained his certificate, is void, and the certificate obtained under it a nullity.

TILL and another, Assignees of BRETT, a Bankrupt, v. WILSON, a prisoner.

24. 7 B R 684.
THIS was a rule calling upon the plaintiffs to shew cause why the defendant should not be discharged out of custody as to this cause, he having obtained his certificate under a commission of bankrupt issued against him.

The defendant's affidavit, upon reading which the rule was drawn up, stated, that a commission of bankrupt issued against him on the 27th September, 1827, under which he had duly and without fraud obtained his certificate; that he became bankrupt, and a commission issued against him in May, 1816, under which assignees were duly chosen, and that he did not obtain his certificate under that commission; that in the course of the year 1816, he began again to trade on his own account; and so continued to trade until the year 1825, during which time he contracted several debts, and among others with the petitioning creditor under the second commission, and with *Brett*, the bankrupt, whose assignees were the plaintiffs in this action; that since his first commission, deponent had acquired very considerable property in money and houses, and that the assignees under his first commission had never in any way interfered with him while he was so trading, or claimed any part of his property so acquired, although he believed and had no doubt that they were well acquainted with his so carrying on trade, and with his so acquiring property after his first commission; and that the debt in this action, and upon which he had been charged in execution, accrued before he became bankrupt, and was a debt provable under his second commission, and was contracted by *Brett* in the year 1823 with full knowledge of the fact that deponent was at that time an uncertificated bankrupt.

In opposition to the rule were the affidavits of *Brett*, the bankrupt, and of Mr. *Dodd*, the plaintiffs' attorney. The former stated, that deponent had been intimately acquainted

with the defendant for ten years, during the greater portion of which time the defendant had been a prisoner in the King's Bench Prison, or in the rules thereof; that about the beginning of the year 1821 the defendant occupied premises within the rules of that prison, and continued there till about Midsummer 1823, and during that time either carried on or superintended the management of a manufactory for making revolving heels for boots and shoes, for which a patent had been obtained; but that deponent had been informed by the person who obtained such patent, and believed, that such business was carried on in the name of *George Wilson*, a brother of the defendant, and not in the name of the defendant, and that the defendant had not at any other time during the period deponent had known him, carried on or been concerned in any other business, the defendant having resided part of such time at the house of deponent, situate within the rules of the King's Bench Prison, and having been at several other times confined within the walls of the said prison; that deponent had been informed by the defendant, and believed, that some time in the latter end of the year 1823, the defendant applied to take the benefit of the Insolvent Act, but did not obtain his discharge under the same, and that the defendant had frequently since that period lamented to deponent his inability so to obtain his discharge, and had repeatedly told deponent that it was his intention to procure a commission of bankrupt to be issued against him, at the same time stating that he had secured his property to a *Miss Jackson*, with whom he then did and still continued to live; that deponent was well acquainted with *Mr. Wallis*, one of the assignees under the defendant's second commission, the said *Wallis*, having been in the habit of attending almost daily on the defendant while he resided at deponent's house; that the defendant was in the habit of representing himself, as residing at the house of *Wallis*, and having his letters and communications dated and directed there while he was such prisoner, as aforesaid; and that about twelve months since the defend-

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TILL
v.
WILSON.

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 TILL
 v.
 WILSON.

ant applied to deponent to negotiate the sale of some premises he represented himself to be interested in, on which occasion the defendant desired deponent to give his address as residing at the house of *Wallis*, and not to mention that he was a prisoner in the King's Bench, but which property was not disposed of; that the debt for which this action was brought was for clothes furnished by deponent previous to his bankruptcy to the defendant, and for money lent by deponent to the defendant; but that deponent positively denied that at the time such debt was contracted he knew, or had any reason to believe, that the defendant was an uncertificated bankrupt, or that he had ever been a bankrupt; and that deponent had lately conversed with several of the creditors under the defendant's first commission, who had severally declared it to be their determination immediately to prosecute that commission with effect, and secure to themselves any property the defendant might be possessed of or entitled to. Mr. *Dodd's* affidavit stated, that having lately ascertained that the defendant was an uncertificated bankrupt under a commission issued against him in the year 1816, deponent advised the plaintiffs not to prove their debt under the defendant's second commission, under the impression that such second commission was wholly inoperative; that on receiving a copy of the rule nisi in this cause for the defendant's discharge, deponent sent to Messrs. *Paterson and Peile*, the attorneys for the defendant in this cause, and also under his second commission, the following letter:

"*Till v. Wilson*. In order to put the court in possession of the whole of the facts connected with this case, upon shewing cause against the rule nisi served in this cause for the defendant's discharge, I beg to request you will permit me to inspect the proceedings under the commission of bankrupt against the defendant, or furnish me with the following particulars, viz.; the time and for what the petitioning creditor's debt was contracted, the time and nature of the act of bankruptcy, the period at which and the place

where the trading was carried on, and the name and address of the assignees, and when their debts were contracted. My reason for requesting this information is because I have been informed that the whole of the above facts occurred during the period of the defendant's imprisonment in the King's Bench, and with full knowledge of the different parties of his being an uncertificated bankrupt, of which circumstance I conceive the court ought to be apprized."

To which deponent received the following answer :

"*Till v. Wilson.* We have received your letter requesting us to allow you to inspect the proceedings under the commission of bankrupt against the above defendant, or to furnish you with certain particulars. As your clients are not creditors under the commission, and being satisfied that the information required by you in their behalf is only for the purpose of assisting them in their endeavours to defeat the commission, we feel it our duty, as representing the assignees and the creditors under the commission, who are mutually interested in securing to themselves by virtue of the commission the property of the defendant, to refuse the request you made. We think you may be quite satisfied the commissioners would not have adjudged the defendant a bankrupt, had there not been a good petitioning creditor's debt, and sufficient evidence of a trading and an act of bankruptcy. We see no objection to inform you the names and addresses of the assignees; they are," &c.

That deponent was informed by Mr. Paterson, one of the defendant's said attorneys, that the defendant obtained his certificate upon the 42d day after the opening of such second commission against him, being the time of passing his final examination.

Tindal, S. G. and Chitty, shewed cause.—This rule must be discharged. Looking at the facts of the case altogether, as disclosed by the affidavits on the one side and on the other, it is clear that the second commission is void, both at law and in equity. The new bankrupt act, 6 Geo. 4, c. 16,

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has made no alteration in the law bearing at all upon this question; therefore the case may be considered independently of that act, and with reference exclusively to the old law. There are many cases, both in this court and in the courts of equity, which are decisive to shew that the second commission in this case is absolutely void. In *Ex parte Proudfoot* (a), though there were special circumstances which induced the Lord Chancellor to abstain from setting aside the second commission, the law was clearly laid down in favour of the present argument. It was there said, that when assignees are chosen under a first commission, all the estate and effects of the bankrupt are vested in them, and he is incapable of carrying on any trade, and all his future personal estate is affected by the assignment, and every new acquisition will vest in the assignees. The bankrupt is incapable of acting, and therefore no second commission can be taken out before he has his certificate under the first, for till then nothing can pass under the second, at least of personal estate; consequently the certificate under the second commission can have no operation at all, and would be void at law. In *Martin v. O'Hara* (b), Lord Mansfield said, "an uncertificated bankrupt is incapable of trading or contracting for his own benefit; all the property he acquires belongs to his creditors. If he cannot trade for himself, he cannot be the object of a second commission." And Buller, J., said, "I take it to be perfectly clear that a second commission cannot be taken out against an uncertificated bankrupt; and for this reason: it would be entirely idle and nugatory." In *Ex parte Crew* (c), Lord Eldon said, "I am aware of all the difficulties that belong to the case of two commissions subsisting against the same person. The assignee cannot bring an action, or protect himself under it; in short, the second commission cannot have any operation except under direction of arrangement here. If a joint commission issues against persons, one of whom has

(a) 1 Atk. 253.

(c) 16 Vesey, jun: 236.

(b) Cowp. 823.

been declared a bankrupt under a separate commission against him, the joint commission is a nullity; one of the parties being already a bankrupt under a prior commission. So, a joint commission subsisting, a separate commission against one of these bankrupts is a nullity. We are now in the habit of making an arrangement; superseding the one or the other, as may best answer the ends of justice: but in Lord *Hardwicke's* time, both the joint and the separate commissions stood together; and that being permitted, the necessity was felt of giving the bankrupt, by arrangement, the benefit of a certificate to be signed by some creditors of a class who, strictly speaking, could not come in." That shews, conclusively, that a certificate obtained under a second commission, in the ordinary course, and without the special authority and arrangement of the great seal, cannot be available. Where, indeed, there is negligence or misconduct on the part of the creditors under a first commission, the Lord Chancellor will not interfere to stop a second; but that is not the case here. It was held by Lord *Eldon*, in *Ex parte Bullen* (a), that a second commission sued out while a first was subsisting was, strictly speaking, void; but that such first commission could only be set up against a subsequent one while it was in legal operation. Therefore the present question being raised in a court of law, the second commission must be held void, and there is nothing upon the affidavits to shew that the first commission is not in legal operation. In *Ex parte Pachalor* (b), the existence of a prior separate commission was held by Lord *Eldon* to invalidate a subsequent joint one; and in *Warner v. Barber* (c), the assignees under a second commission were held entitled to recover against a third person, only on the ground that the first commission was not in legal operation. In an earlier case of *Troughton v. Gitley* (d), before Lord *Camden*, the same principle seems to have been had in view. There, creditors under a commission having

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(a) 1 Rose's B. C. 134.

(b) 2 Rose's B. C. 26.

(c) 2 J. B. Moore, 71.

(d) Ambler, 630.

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permitted the bankrupt, who was uncertificated, to go on trading until the time of his death, his subsequent creditors were preferred to those under the commission, who were held in equity to have lost their priority, though the bankrupt's subsequent effects were held in law to remain vested in his assignees. That result follows necessarily from the provision, that if a man does not pay fifteen shillings in the pound under a second commission, his future effects remain liable; because, if a man who had not obtained his certificate under a first commission, but who had obtained it under a second, could be protected in that respect, he would stand in a better situation than the man who had obtained his certificate under a first commission. In *Ex parte Martin* (a), it was said by Lord Eldon to be "very clearly settled that if a man has been declared a bankrupt under a separate commission, another commission against him cannot be maintained until he has obtained his certificate under the former;" and in *Ex parte Rhodes* (b), that, "the first commission subsisting, of whatever date, the second is clearly bad." In the latter case his lordship seems to have expressed an opinion that the case of *Troughton v. Givley* (c), had been carried too far, for he added, "cases have, however, occurred where an old commission subsisting, and the bankrupt having gone again into trade, a new commission issued, which he attempted to supersede: and it was held, that if the persons claiming beneficially under the old commission did not mean to interfere with the effects under the latter commission, the Court would not interpose; yet then this difficulty remained, that the first commission might be set up as a bar to an action under the second. The Court, however, has refused to interfere in that case, and has, in Lord Hardwicke's time, frequently permitted two commissions to proceed together; a separate after a joint commission; yet it is clear in law that the separate commission was bad. Many important observations arise

(a) 15 Vesey, jun. 115.

(c) Ambler, 630.

(b) 15 Vesey, jun. 549.

against what the Court did in *Thoughton v. Gitty*." Upon the whole review of the subject, therefore, it is clear that the second commission in this case is void in law, or at least that no benefit can be derived from the certificate obtained under it, unless it were obtained by the special permission of the Lord Chancellor, with reference to the first commission; the plaintiffs, therefore, can be affected only by the first commission; and as, according to the law as it stood when that commission issued, they had their election either to hold the body of the bankrupt, or to prove, they have the same privilege now, and not having proved, are entitled to the benefit of the arrest.

Parke, contra.—The second commission and the certificate obtained under it are not absolutely void, but voidable only. The principal reason given for the law as laid down in *Ex parte Proudfoot* (a), was, that when once a commission has issued against a man, he is, until he obtains his certificate, incapable of acquiring any future property. Even as the law stood at the date of that decision, the proposition appears to be laid down a little too broadly, because it is clear that as against all the world, except his assignees, an uncertificated bankrupt has a right to goods acquired by him since his bankruptcy, and that against a stranger he may maintain trover for them; *Webb v. Fox* (b). As the law now stands it is plain that the defendant is entitled to his discharge by the express words of the statute 6 Geo. 4, c. 16; for s. 126 of that statute declares that any bankrupt who shall, after his certificate shall have been allowed, be arrested, or have any action brought against him for any debt, claim, or demand, thereby made proveable under the commission against such bankrupt, shall be discharged upon common bail; and s. 127, vests a bankrupt's future estate and effects in his assignees only in cases where he shall have been so discharged by such certificate as aforesaid, or shall have compounded with his creditors, or shall have been

(a) 1 Atk. 353.

(b) 7 T. R. 391.

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discharged by any insolvent act. Some equity cases have been cited as shewing that the commission was there admitted to be void, though the Lord Chancellor refused to interfere upon the ground of negligence in the applicant; but the fair effect of those cases seems to be to shew that those commissions were not absolutely void, but voidable only. There are other cases to the same effect. In *Bateson v. Hartsink (a)*, where a bankrupt pleaded his bankruptcy, and relied on his certificate, which the plaintiff contended was void under 5. Geo. 2, c. 30, Lord Kenyon decided that the plaintiff could only impeach the certificate, and not the commission. The proper course to be adopted by a creditor who seeks to impeach the commission itself, is to petition to supersede the commission. That is the only mode by which all the questions which appear from the equity cases cited on the other side so peculiarly fit for discussion before the Lord Chancellor, can be conveniently discussed and disposed of. After those cases, and the practice which has prevailed of making special arrangements about commissions of this nature, it cannot, at all events, be assumed as a settled point that the second commission is void at law. In *Butts v. Bilke (b)*, this question was raised upon a special verdict, and underwent a full discussion in the Court of Exchequer. All the cases cited now were then brought before that Court, and *Thompson, C. B.*, said, "that as the court considered the question one of great difficulty and importance, and that as the objection resting on the point of, whether the third commission was absolutely void, or merely voidable, ought to be well weighed, as it was clear from many of the cases that the Chancellor frequently gave effect to such subsequent commissions, by superseding the first, the Court were of opinion that the cause had not gone far enough to develop the merits, so as to enable them to pronounce a conclusive judgment; and that as the question required the utmost consideration, all the facts ought to be put upon the record, for the purpose

(a) 4 Esp. N. P. C. 43.

(b) 4 Price, 240.

of receiving a solemn determination." No such determination, however, was arrived at, for the case went off upon a defect of evidences of an act of bankruptcy; but at least that case shews that the question is unsettled. Then came the case of *Warner v. Barber* (a): that was before the Court of Common Pleas, who, so far from considering the question as settled, postponed that cause in consequence of the case of *Butts v. Bilke* being then depending in the Court of Exchequer; and upon that case going off, they actually gave judgment in favour of the second commission, holding, that where a prior and joint commission had been issued, but not acted on or superseded, such commission did not invalidate a second separate commission: and since that, in *Todd v. Maxfield* (b), where a defendant had been three times declared a bankrupt, and had not paid 15s. in the pound under the second commission, this Court held, that the third commission was not void on that account, but voidable only. *Martin v. O'Hara* is the only authority that seems strongly against the present defendant, and that case only decided that a second commission against a bankrupt, *pending* a former one, (which the former commission here can hardly be said to be,) under which he has not obtained his certificate, is void; besides which, that decision proceeded on the ground, that "the proceedings under the last commission were manifestly a gross fraud and contrivance on the face of them; that the whole was a gross fraud:" whereas here it is clear, that no fraud was contemplated, nor, indeed, can it be said, that any has been practised.

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Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered judgment, and after stating the substance of the affidavits, thus proceeded: The case principally relied upon in argument, to shew that the second commission in this case was void, was that of

(a) 2 J. B. Moore, 71.

(b) 5 D. & R. 258; 3 B. & C. 222.

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Martin v. O'Hara (a). It was there decided that a second commission against a bankrupt, pending a former one under which he had not obtained his certificate, was void; a decision which applies very strongly to the present case. It is but justice, however, to observe, that the second commission in that case was evidently a mere contrivance; entirely founded in fraud,—an observation which is not applicable to the present case; though here there is no evidence to shew that the assignees under the first commission in any manner acquiesced in the issuing of the second, or in the subsequent trading of the bankrupt. The opinions of the different lords chancellors, which were cited, appear to have been, that the second commission, in a case like the present, would be void. On the part of the defendant we were referred to the case of *Webb v. Bos* (b), where it was decided that an uncertificated bankrupt might maintain trover in respect of goods acquired since his bankruptcy; but the reason of that is, that as between him and all the rest of the world, except his assignees, he has a special property in the goods. The case of *Butts v. Bilke* (c) was also mentioned, but nothing was decided with respect to this question there; and we were referred to it merely as shewing the unsettled state of the question; It was urged on the part of the defendant that the second commission ought to be deemed good until it was superseded; or that the Lord Chancellor would, upon application to him, allow the second commission to stand and supersede the former: but we do not consider ourselves called upon in this case to say what would be the effect of a *superedeas* either of the first or of the second commission. We are of opinion, that in this case the second commission was absolutely void; and that all the property of the bankrupt, subsequently acquired, vested in his assignees under the first commission. The case of *Todd v. Maxfield* was also mentioned, with reference to the effect of a second

(a) Cowper, 825.

(c) 4 Price, 240.

(b) 1 T. R. 391.

commission, under which the bankrupt did not pay fifteen shillings in the pound; but the effect of that can have no bearing upon the present question. The law is now altered in that respect; and by the 6 Geo. 4, c. 16, s. 127, the future property in such cases vests in the assignees, who are entitled to seize the same in like manner as they might have seized property of which the bankrupt was possessed at the time of issuing the commission. Upon the authority, therefore, of *Martin v. O'Hara*, and of the repeated declarations of lords chancellors, that in such a case as this the second commission is absolutely void, we are of opinion that the certificate obtained by the defendant under that commission is unavailing, and consequently that the rule for discharging him out of custody at the suit of the plaintiffs must be discharged.

Rule discharged.

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The KING v. The COMMISSIONERS of the Parish of
ST. PAUL, SHADWELL.

BY an act, 15 Geo. 3, cap. 54, entitled "An act for paving and regulating, and for preventing nuisances and obstructions within New Gravel Lane, and the several streets, lanes, passages, and places within the parish of St. Paul, Shadwell, in the county of Middlesex, not comprised in an act passed in the 11th year of his present Majesty's reign, for paving and regulating Rosemary Lane and the other places therein mentioned;" certain persons were appointed commissioners for pavement for part of the parish of St. Paul, Shadwell, and it was enacted, that it should be lawful for the said commissioners to borrow, upon credit upon the rates and assessments to be made by virtue of that act, any sum or sums of money at interest, and to raise

The Court will grant a *writ* to commissioners entrusted by act of parliament with the regulation of the expenditure of a parish, to compel them to levy a rate for the purpose of paying off a sum borrowed on the rates by former commissioners without pledging their personal responsibility, where the liabilities created under the former act are reserved by the new act, although the latter directs that the commissioners shall be sued in the name of their clerk, and no interest has been paid within twenty years.

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any sum or sums of money by the sale of annuities for the natural life or lives of such person or persons as should be nominated or appointed by the purchaser or contractor, so as such annuity or annuities did not exceed the rate of 10*l.* per cent., and so as the purchase money for any one annuity exceeded not 1000*l.*, and so as the moneys to be raised by the ways and means aforesaid, or either of them, did not exceed 5000*l.*; and that it should be lawful for the commissioners to make an order for the repayment of the moneys to be borrowed as aforesaid and the interest thereon, and also for the payment of such annuity or annuities as should be purchased as aforesaid, particularizing at what respective times in the year, and in what proportions, the said interest and annuities should be paid, according to the agreement of the parties, upon the said loan or purchase; and from and immediately after such order and receipt for the moneys advanced should be signed by the commissioners, the moneys so advanced and lent at interest, and the respective annuities, were thereby charged upon the rates and assessments to be made by virtue of that act.

Under this act 300*l.* was borrowed from *John Armitage*, for which he received the following document, signed by five of the commissioners, but not sealed :

“ We, the commissioners constituted and appointed for putting in execution an act of parliament made and passed in the fifteenth year of the reign of King *Geo. 3.* entitled ‘ An act for paving and regulating, and for preventing nuisances and obstructions within New Gravel Lane, and the several streets, lanes, passages, and places within the parish of St. Paul, Shadwell, in the county of Middlesex, not comprised in an act, passed in the eleventh year of his present Majesty’s reign, for paving and regulating Rosemary Lane, and the other places therein mentioned,” *have, in pursuance and by the authority vested in us by the said act, borrowed of John Armitage, of, &c. the sum of 300*l.* upon the credit of and chargeable upon the rates and assessments to be made by virtue of the said act, for which we have agreed to pay*

interest for the same at and after the rate of 4*l.* 10*s.* per cent. per annum, in the proportion, manner and form after mentioned, until the repayment of the said principal money. Now we, the said commissioners, according to our agreement with the said *John Armitage*, and in consideration of the said sum of 300*l.* to us in hand paid, as by our receipt indorsed doth appear, *have*, at our meeting held in pursuance of the said act, at the Vestry Room of the parish church of St. Paul, Shadwell, aforesaid, the day these presents bear date, ordered, directed and appointed, and by these presents do order, direct and appoint to be paid to the said *John Armitage*, his executors, &c. yearly and every year until the redemption of the said rates by the repayment of the said principal sum of 300*l.*, exclusive of the interest that shall accrue due thereon as aforesaid, the yearly sum of 13*l.* 10*s.* as and for the interest of the said sum of 300*l.* at the rate of 4*l.* 10*s.* per cent. per annum, by four equal quarterly payments on the usual feasts or quarter days following, &c. and which interest *shall be paid and payable out of the money arising by the rates and assessments to be paid by virtue of the said act*, as the same is thereby directed: provided always that nothing herein contained shall extend or be construed to give the said *John Armitage*, his executors, &c. a priority to any other charges made by the same commissioners on the said rates, but that all such charges shall stand in equal degree. In witness whereof, and in obedience to and under the direction of the said act, we do sign this our order this 26th day of August, 1776."

In July 1801, *Armitage* being dead, *Drewry*, his surviving executor, received five years' interest, due at Midsummer, 1801, from the acting commissioners; 6*l.* 15*s.* in February, 1802, for interest due at Christmas, 1801; and in the summer of 1802, the interest due at Midsummer in that year. *Drewry*, being engaged in business at Derby, and not having occasion to come to London, had not applied for the payment of interest from 1802 to 1812.

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By an act of 50 *Geo. 3*, intituled "An act for better regulating, maintaining and employing the poor within the parish of St. Paul, Shadwell, in the county of Middlesex; for better lighting, watching, paving, cleansing, repairing, and improving the streets and other public places in the said parish; and for repealing three acts severally passed in the 29th year of King *George* the 2d, and in the 10th and 15th years of his present Majesty, relative thereto," the said act of 15 *George* 3d, and two other acts therein recited, and all the several powers and authorities, matters and things therein contained, so far as they related to the said parish of St. Paul, Shadwell, were repealed and made void to all intents and purposes whatsoever, save and except as to the recovering, levying, collecting, and receiving any penalties, rates or assessments due at the time of passing that act, *and the payment of the several bonds, annuities, and other debts and sums of money secured and then remaining due or subsisting, and payable under those acts repealed or any of them*, and which said penalties, rates and assessments might and should be recoverable, levied and collected, and bonds, annuities and debts paid under the powers and authorities of that act; and that that act should be considered as extending in its operation, effects and powers over the whole of the said parish of Shadwell.

By section 16, it was enacted, "that the said commissioners should and might sue and be sued in the name of their clerk or clerks for the time being, to be appointed under that act."

Between 1812 and 1823 several applications were made by *Drewry* and his agents to the commissioners for putting that act into execution, and their clerk and treasurer, for payment of the arrears of interest, without effect, upon which *Drewry* filed a bill in Chancery. The cause came to a hearing in Michaelmas, 1826, when the bill was dismissed without costs, with an intimation from the Master of the Rolls (*Sir John Copley*) that the proper course

was for *Drewry* to apply for a *mandamus*. On the 9th of July, 1827, *Drewry* gave notice to the commissioners that he intended to, and should and would, as soon after the expiration of twenty days of their being served with that notice, as an opportunity should occur, unless the commissioners named and appointed by virtue of the said act of 50th Geo. 3d, some or one of them, should and did forthwith pay unto him, as such surviving executor, the arrears of interest then due under and by virtue of the said deed-poll, or part thereof, make or cause to be made an application to the Judges of his Majesty's Court of King's Bench, at Westminster, for a *mandamus*, to compel the said commissioners to appropriate a part of the moneys arising from the rates and assessments levied or to be levied under the said last mentioned act, towards payment of the arrears and future payment of the said interest.

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In Michaelmas term last, *Coleridge* obtained a rule calling upon the commissioners, "appointed and acting under and by virtue of a certain act of parliament, made and passed in the 50th year of the reign of his late Majesty King *George* the 3d, for better regulating, maintaining and employing the poor within the parish of St. Paul, Shadwell, in the county of Middlesex; for better lighting, watching, paving, cleansing, repairing and improving the streets and other public places in the said parish; and for repealing three acts severally passed in the 29th year of King *George* the 2d, and in the 10th and 15th years of his said late Majesty King *George* the 3d, relative thereto," to shew cause why a writ of *mandamus* should not issue, directed to them, commanding them to make all necessary orders, and to take all necessary measures for appropriating a part of the moneys arising from the rates and assessments levied or to be levied under the said first mentioned act, towards payment to *John Drewry* of the arrears, and future payments of the interest, secured by a certain deed poll granted (in

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pursuance of the said act of the 15th year of the said late King George the 3d) to one *John Armitage*, for securing the sum of 300*l.* and interest, to which said deed-poll the said *John Drewry* is entitled, as the sole surviving executor of the said *John Armitage*, deceased.

Gurney and *Platt* now shewed cause. No application for payment having been made for the last twenty-six years, the debt must be presumed to have been paid. If it has not, the act points out the remedy by action against the clerk; and the Court will not grant a *mandamus* where the party has another specific remedy (*a*). The application for a *mandamus* ought to be made within a reasonable time. In *Rex v. The Justices of Lancashire* (*b*) the Court refused a *mandamus* to make a rate to reimburse inhabitants, on whom a fine had been levied for non-repair of a highway, after an interval of eight years. This is not a deed-poll, as it is not under seal. If this had been the case of a private individual, he would have been barred after six years. It is the duty of the commissioners, who are trustees for the public, to take the opinion of the Court.

Coleridge, contra, was stopped by the Court.

Per CURIAM.—The clerk cannot be sued except where the commissioners are liable, and their liability must depend upon the form of the instrument. Upon this instrument no party could be sued. Where an action is brought, and you plead payment, you may in general rely upon the period which has elapsed. So here, if there is any mode of compelling payment, you may return payment to the

(*a*) *Rex v. Bishop of Chester*, 1 T. R. 396; *Rex v. Mayor of Colchester*, 2 T. R. 259; *Rex v. Archbishop of Canterbury*, 8 East, 213; *Rex v. Commissioners of Dean*, 2

M. & S. 80; Com. Dig. *Mandamus*, A. B.; Selw. N. P. 7th ed. 1080.

(*b*) 12 East, 366; and see *Rex v. Stainforth and Keadby Canal Company*, 1 M. & S. 32.

mandamus. But this is money lent to a public body. If it had been paid, their books would contain some entry to that effect: the books of the old commissioners would be handed over to the new; and the last act contains an express reservation of all powers and liabilities which existed under the former acts.

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Rule absolute.

LOVELAND v. KNIGHT.

THIS was an action of debt, upon a bond executed by the defendant, as the surety of *A. B.*, a collector of assessed taxes, for the due payment over by the latter of the taxes collected by him. Plea, *non est factum*. At the trial before Lord *Tenterden*, C. J., at the last London Sittings, the only question was whether the title of the act of parliament, authorizing the collection of the taxes in question, was correctly recited on the record, in which the condition of the bond was set out upon oyer; the condition, as it appeared upon oyer, stating that the act was one respecting "duties on assessed taxes," whereas, according to the condition of the bond when produced in evidence under the issue of *non est factum*, the title of the act was, "duties of assessed taxes." It was objected that this was a fatal variance; but the Lord Chief Justice overruled the objection, and the plaintiff had a verdict.

Where the condition of a bond describes a public act of parliament as an act respecting "duties of assessed taxes," which is the true title, but upon oyer the condition is set out as describing it as an act respecting "duties on assessed taxes," the variance is not fatal.

F. Pollock now moved for a new trial, and renewed the objection. It is a rule of pleading that where a document is set out upon oyer, it must be correctly set out, even to the very letter. In such cases a variance in appearance, though none in sense, is fatal. In *Waugh v. Bussell* (a), the defendant in an action of debt on bond prayed oyer of the condition, which was for the payment of "one hundred

(a) 1 Marsh. 214; 3 Taunt. 707.

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pounds," and pleaded *non est factum*; the word *hundred* was omitted in one place in the condition; and it was held that this was such a variance between the oyer and the condition as precluded the plaintiff from recovering. [Bayley, J. This is a public act; are we not bound to take judicial notice of the way in which it is worded? Is not the Court bound to take notice that there is such an act containing the word *of*, and that there is no such act containing the word *on*? Lord Tenterden, C. J. I have always understood the rule to be, that where the erroneous expression does not alter the meaning of the sentence, but leaves it equally intelligible, it is no variance. Is not that the case here?] By setting out the bond on oyer, the plaintiff professes to set it out in the very words and letters, and is bound to do so. [Bayley, J. It has been held that the omission of a word where the context supplies it, constitutes no fatal variance.] By the statute 28 *Eliz.* c. 4, sheriffs are liable to a penalty for taking more than a certain sum on executions "upon the body, lands, goods, or chattels;" and where a declaration on that statute, in reciting it, stated the words as, "body, lands, goods, and chattels," the variance was held to be fatal. *King v. Marsack* (a). In *Boyce v. Whitaker* (b), Lord Mansfield said that where a party unnecessarily set out an act of parliament, he would hold him to half a letter; and in *Mills v. Wilkins* (c), Lord Holt, speaking of an act of parliament, said, the title is not a material part, neither is it necessary to set it forth, but yet it is a name given by the makers, and therefore you must describe it accordingly, if you will describe it by its title.

LORD TENTERDEN, C. J.—I was of opinion at the trial, and I am of the same opinion now, that the meaning of the sentence in this case is not altered or obscured by the mistake that has been fallen into; and therefore, that there

(a) 6 T. R. 771.

(b) Doug. 94.

(c) 2 Salk. 609.

is no variance. The rule of pleading is, that you must not vary the *sense* of that which you profess to set out. The case cited of *Waugh v. Bussell*, is very different from the present. There the expression *one pounds*, was substituted for that of *one hundred pounds*, which was a material alteration of the sense and meaning of the passage. Here, there is no such alteration; for the expressions, "duties *on* assessed taxes," and "duties *of* assessed taxes," both convey precisely one and the same meaning, and therefore I think there is no variance, and no reason for granting the rule.

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BAYLEY, J.—I am of the same opinion. I take it that in deciding the question, whether there is a fatal variance or not, you are not merely to consider whether there is something stated which is apparently wrong, but you are to look at the sentence altogether, and at the context, to see whether you can collect from the whole the sense intended to be expressed; and that if you can do so, it is not a fatal variance. In *King v. Pippett (a)*, where the declaration set out the precept from the sheriff to the portreeve of a borough, the improper insertion of the word *if*, was held no variance, for it might be rejected as surplusage. So there are cases in which the improper omission of a word has been held no variance, because, looking at the sentence altogether, it was easy to ascertain the word intended to have been inserted, and the meaning intended to be expressed. The act of parliament in this case is a public act, the language and meaning of which we are bound to know; we cannot doubt that it was intended to describe the act as one regarding the duties *of* assessed taxes, and therefore we are bound to read it so.

The other Judges concurred.

Rule refused.

(a) 1 T. R. 235; and see *Draper v. Garratt*, 3 D. & R. 226; 2 B. & C. 2.

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DOE, on the demise of BYWATER v. BRANDLING and others.

By a local act of parliament, and a lease made in pursuance thereof, *A.* grants to *B.* lands, with liberty to lay waggon ways for the carriage of coals, for the term of 60 years, and such further term as *B.*, his executors, &c., should work certain coal mines; proviso (both in the act and the lease), that if *B.* cease to work the mines, or fail in any one year to carry a certain quantity of coals to a depository called *C.*, *A.* may re-enter. By a subsequent act the quantity to be carried is increased; proviso, that if *B.* do not yearly carry such increased quantity to *C.*, "or to some other place near thereto, to be used as a depository for coals instead thereof," *A.* may re-enter. By the last proviso, the first is virtually repealed; and *B.* carrying the increased quantity to a depository near to *C.*, is excused from carrying coals to *C.*

THIS was an action of ejectment, brought to recover certain messuages, lands and premises, situate in the parishes of Leeds and Hunslet, in the West Riding of the county of York. At the trial before *Bayley, J.*, at the Yorkshire Spring Assizes, 1826, a verdict was found for the plaintiff, subject to the opinion of this Court, on the following case:

Elizabeth Bywater, being seised in fee of the premises in question, by indenture bearing date 1st August, 1758, made between the said *Elizabeth Bywater* of the one part, and one *Charles Brandling*, since deceased, of the other part, in consideration of the yearly rents and covenants thereafter reserved and contained on the part and behalf of the said *Charles Brandling*, his executors, administrators and assigns, to be paid and performed, granted, demised, leased, set and to farm let unto the said *Charles Brandling*, his executors, administrators, and assigns, two closes or parcels of land in the said indenture mentioned and described, and which are the premises sought to be recovered in this action, and also a certain stable or helm therein mentioned, and also full and free liberty, power and authority for him the said *Charles Brandling*, his executors, administrators and assigns to make, lay and place such waggon way or road, waggon ways or roads, as were then commonly made use of for and about the coal mines and coal works in the counties of Durham and Northumberland, and such branches from the same, in, upon, over, and through the closes, or parcels of ground thereby leased, or any part or parts thereof, as should be proper and necessary for the carriage and conveyance of coals from the coal mines or coal works of him the said *Charles Brandling*,

within the manor of Middleton, or elsewhere, to Casson Close, near Leeds Bridge; which said place, called Casson Close, was and is mentioned in a certain act of parliament, made and passed in the 31st Geo. 2, as a coal yard or depository for coals, to be brought from the said coal mines or coal works for the purposes in the said act mentioned; and also full and free liberty, power, and authority for him the said *Charles Brandling*, his executors, administrators and assigns, by and with workmen, servants, horses and carriages, to break, cut, dig and remove the soil of any part or parts of the said closes or parcels of ground, and to carry, convey, fix, lay and place wood, timber, bricks, stone, earth, gravel, iron rails, sleepers and other materials, unto, in and upon the said closes or parcels of ground, or any part or parts thereof; and also to cut, dig and make any trench or trenches, bridge or bridges, and to do all other acts and things requisite, necessary or convenient, as well for the making, laying and placing the said waggon way, or ways, and branches, as for the repairing and keeping the same in good order and repair from time to time, as occasion should require. And also full and free liberty, power and authority for him the said *Charles Brandling*, his executors, administrators and assigns, and his and their servants, agents and workmen, and other persons by him or them employed, to go, pass and repass in, upon and along the said waggon way or ways, and branches, so to be made as aforesaid, with horses or other beasts of burthen, or draught waggons or other carriages, loaden or unloaden. To have, hold, use and enjoy the same unto the said *Charles Brandling*, his executors, administrators and assigns, from the 1st May, 1758, for and during the term of sixty years, fully to be complete and ended, and for such further term or longer time as the said coal works, collieries or coal mines, then belonging to him the said *Charles Brandling*, or any other coal works, collieries or coal mines, whereof or wherein he, his executors or administrators should, during such term of years, be seised, possessed of or interested in, within the said manor of Middleton, or elsewhere, in the West

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Riding of the county of York, should continue to be used and wrought; yielding and paying therefore, yearly and every year, during the term thereby granted, for the said waggon way or ways, the yearly rent of two pounds, and for the rent and residue of the closes, lands and grounds, the sum of eleven pounds. And the lease contained a proviso in the following terms: "*Provided* also, that in case the said *Charles Brandling*, his heirs or assigns, shall cease and leave off to work the said collieries or coal works, or the same shall by means of fire or water, or by any other inevitable accident, fail or become incapable to be wrought, or in case the said *Charles Brandling*, or any other owner or proprietor thereof for the time being, shall refuse or neglect in any one year to bring or cause to be brought to the depository or coal yard aforesaid, such quantity of coals (unless prevented by fire, water, or any other inevitable accident,) or to sell and dispose thereof at such rates and prices, or for such purposes, as in and by the said act of parliament is in that behalf mentioned, provided and appointed; then and in any of the said cases it shall and may be lawful to and for the said *Elizabeth Bywater*, her heirs and assigns, to enter into and upon the premises hereby leased, and then also all the estate, right, title, interest and privilege of him the said *Charles Brandling*, his executors, administrators and assigns, of and in the same, shall in that case and from thenceforth cease, determine and be void." Covenant by the lessee for the payment of the rents, and covenant by the lessor for quiet enjoyment. The lands demised consisted of four acres and two perches, the real quantity by admeasurement. The said *Elizabeth Bywater* died seised in fee of the reversion of the said demised premises in 1760, and by her will (after a devise of an estate for life to her uncle, *John Bywater*,) devised the said reversion to her cousin, *Charles Bywater*, in fee, who survived the testatrix, and died seised in fee of the said reversion, having by his will devised the reversion to his brother, *John Bywater*, for life, and from and after the decease of his said brother *John*, to the heirs of the body of his said brother *John*,

lawfully to be begotten. *John Bywater*, the devisee, survived his brother *Charles Bywater*, and died in 1824; and the lessor of the plaintiff is his eldest son. *Charles Brandling*, the lessee, entered into and was possessed of the demised premises, under the lease of 1758, and *Charles John Brandling*, one of the defendants, on the day of the demise laid in this ejectment, and also at the time of the commencement of this action, had succeeded his father as the owner and proprietor of the collieries or coal works mentioned in the lease above set forth, and together with the other defendants, as his under-tenants, was in possession of the premises demised by *Elizabeth Bywater* as aforesaid. The term of sixty years, mentioned in the lease, expired on the 1st May, in the year 1818. No coals whatever have been brought to the depository or coal yard called *Casson Close*, mentioned in the said proviso, for the last eleven years; and the said *Casson Close* ever since has been and now is wholly disused as a depository for coals. The said collieries have been ever since, and still are, regularly used and wrought, and no accident either from fire or water, nor any other inevitable accident, has prevented the coals procured from the said collieries from being brought to the said depository or coal yard in *Casson Close*. But *Mr. Brandling* determined his contract with the proprietors of *Casson Close* by a sale of his interest therein, and erected a new coal staith, which is nearer to the collieries, but which as well as *Casson Close* is beyond the premises in question, in the line from the collieries. *Mr. Brandling*, before the expiration of the sixty years, discontinued the old railway, which was laid on the surface, and was on the level of the ground for waggons drawn by horses, and made an embankment ten feet high and twenty feet wide at the base, along which embankment the coals have since been and still are brought by steam waggons to the new staith, which was a mode of conveyance not made use of or known in the county of *Durham*, or that of *Northumberland*, at the time of the granting of the lease in 1758. The lessor of the plaintiff made an entry to avoid the lease, and notice to

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quit was regularly given by the lessor of the plaintiff to the defendants, which expired before the commencement of this ejectment; but the defendants continue to hold, claiming under the lease of 1758 as a valid and continuing lease. Four acts of parliament, bearing upon this subject, have been passed, namely, the 31 *Geo. 2*, c. 22; 19 *Geo. 3*, c. 11; 33 *Geo. 3*, c. 86; and 43 *Geo. 3*, c. 12; copies of which are annexed to, and are to be referred to as forming part of, this case.

The question, for the opinion of the Court is, whether the plaintiff is, under the circumstances, entitled to recover, on the ground either of the lease having been forfeited, or of its having determined at the expiration of the sixty years. If the Court shall think that he is entitled to recover upon either of those grounds, the verdict is to stand; if not, a nonsuit is to be entered (a).

This case was twice argued: first, at the sittings in *banc* after last Trinity term, before the three puisne Judges, by *Preston* for the plaintiff, and *Blackburn* for the defendant; and afterwards, at the desire of those three learned Judges, in this term, before the full Court, by *Brougham* for the plaintiff, and *Tindal*, S. G., for the defendant. The ques-

(a) The points intended to be insisted upon in argument, as stated in the margins of the Paper Books, were as follows:

The lessor of the plaintiff will contend,

First, that the lease determined when the sixty years expired. Secondly, that if it could have had continuance beyond the sixty years, it determined when the Casson Close ceased to be a place of deposit for coals.

The defendants will contend,

First, that the lease of 1st August, 1758, to *C. Brandling*, for sixty years, and for such further or longer time as the coal mines

should continue to be wrought, is sufficiently certain as to its duration. Second, that the lease was not avoided by coals being deposited at a place adjoining Casson Close, and not in Casson Close itself; inasmuch as the supply of coals to the inhabitants of Leeds, at the prices mentioned in the 31 *Geo. 2*, c. 22, was the main object of the provision; and that the appointment of Casson Close as a depository, was merely directory. Third, that by the 43 *Geo. 3*, c. 12, the legislature authorized Mr. *Brandling* to form another depository for coals, at any place near to Casson Close.

tion in issue depended entirely upon the construction of the local acts of parliament mentioned in the case; and as the acts themselves, and the arguments advanced with reference to them, are fully noticed in the judgment of the Court, it is deemed unnecessary to detail them here.

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Lord TENTERDEN, C. J.—This case depends entirely on the construction to be given to these local acts of parliament, or rather to the last of them, the 43d of *George* the 3d. In construing such acts of parliament, we are to look not at the preamble, or at the words of any one particular clause, alone, but at the language of the whole; and if in the preamble, or in any one clause, we find expressions less large and extensive than we find in other parts, and upon a view of the whole we can see that the larger and more extensive expressions used in other parts best shew what the intention of the legislature was; then it is our duty to give effect to the larger expressions, notwithstanding the more limited phrases which may be found in other places. We must look at the whole act, and form our judgment upon it as a whole. Now the last of these acts, the 43 *Geo.* 3, was made for the purpose of introducing certain alterations in the former acts. The lease in question was, as it has been well expressed by Mr. *Brougham*, entirely the creature of the legislature. Looking at the first act of parliament, we find that the legislature, at the time of passing that act, had for their object, the supplying the inhabitants of Leeds with an adequate quantity of coals at a moderate price. The inhabitants of Leeds were anxious to obtain an adequate supply of coals at a moderate price. Mr. *Brandling*, who was the owner of certain coal mines in the neighbourhood, was willing to furnish that supply on those terms. He could not, however, afford to supply the coals at the price stipulated for, unless he could have a particular line of road, by which he might convey them from the mines to the town of Leeds. These were the principal parties before the legislature at the time of the passing of the first act, namely, the inhabitants of Leeds

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on the one hand, and Mr. *Brandling* on the other. But there were other persons, who came incidentally before the legislature, namely, the owners of certain lands which lay between the coal mines and the town of Leeds. Those persons had, previously to the passing of the first act, entered into agreements with Mr. *Brandling* for granting to him leases, either of the land over which his proposed line of road was to pass, or of a right of way over that land, for a term of sixty years, and for such further term as he might continue to work the coal mines. The legislature, therefore, having all those parties before them, passed the first act of parliament, for the purpose of carrying into effect the object of each. This is clear from the language of the act. It begins by reciting the situation and the objects of the parties I have named, and the existence of the agreements for leases, and then enacts, in the first instance, that Mr. *Brandling* shall be at liberty to convey his coals over the lands and grounds mentioned in the agreements, independently of any lease that might afterwards be granted. It gives him authority to do that, but with this restriction, or upon this condition, that he shall furnish a specific quantity of coals, at a specific price, in every year. It then goes on to provide that leases may be granted, giving at the same time to the landowners, independently of any lease, a remedy for the recovery of their rent, in case it shall become in arrear, by empowering them to seize any waggon load of coals that may be passing over their land. Then comes the clause respecting leases. That enacts "that it shall and may be lawful to and for the said several owners and proprietors of the lands and grounds in and upon which such waggon way or ways shall be made, placed and laid down as aforesaid, and they are hereby authorized and required, by indenture or indentures under their respective hands and seals, to grant, lease or demise such of the several fields, lands, wastes and other grounds so belonging to them respectively, or the liberty and privilege of making, laying, placing and continuing such waggon way or ways in, upon and over the same respectively, unto him the said *Charles*

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Brandling, his executors, &c. for the said term of sixty years, commencing as aforesaid, and for such further term or longer time as such coal works, collieries or coal mines within the said manor of Middleton, or elsewhere, as aforesaid, shall continue to be used and wrought; with such remedies and power for securing, recovering and enforcing the payment of the several yearly rents, payments, reservations and considerations contracted or agreed to be paid for the same, as are herein-before directed, ordered and provided in that behalf; and with such covenants on the part and behalf of the respective parties to the said leases or demises as shall be proper to be inserted therein respectively, in conformity to the tenor, purport and true meaning of the several contracts or agreements between the said parties respectively." It then enacts that the leases shall be enrolled in the public Register Office at Wakefield; and that they shall be as good, valid and effectual as if the persons making them were seised in fee simple of the lands thereby demised. And then comes the proviso, "that in case the said *Charles Brandling*, his heirs or assigns, shall cease or leave off to work the said collieries or coal works, or the same shall fail and become incapable to be wrought, by fire, water or other inevitable accident, or in case the said *Charles Brandling*, or other owner or proprietor thereof for the time being, shall refuse or neglect in any one year to bring or cause to be brought to the depository or coal yard aforesaid (Casson Close) the quantity of coals herein-before mentioned, unless prevented by fire, water, or other inevitable accident; or shall refuse to sell or to offer the same to sale, when brought down to the said coal yard, for the use and consumption of the inhabitants of the said town of Leeds, at the rates or price before mentioned, as by them respectively shall be required; then, and in either or any of the said cases, it shall and may be lawful to and for the owners and proprietors of the several lands and grounds belonging to them respectively, which shall be used and applied in and for the purposes of such waggon way or ways as aforesaid, to enter into and upon the several lands

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and grounds belonging to them respectively, which shall be used and employed for the purpose of such waggon way or ways as aforesaid; and then also all the estate, right, interest and privilege of him the said *Charles Brandling*, his executors, administrators or assigns, of and in the same, shall in that case, and from thenceforth, cease, determine and be void." Under this act of parliament the arrangement went on for some years, when it was found that the quantity of coals furnished was not equal to that required by the inhabitants of Leeds, and also that the price paid was not an adequate remuneration to Mr. *Brandling*; and it being therefore apprehended that he might, as he was entitled to do, if he thought fit, discontinue conveying his coals to Leeds, which would be a great inconvenience to the inhabitants, the second act of parliament, 19 Geo. 3. c. 11, was passed; which required Mr. *Brandling* to furnish a larger quantity of coals than he was required to do by the first act, and enabled him to receive for them, when conveyed to the depository at Casson Close, a larger price than he before received. In this act there is a proviso with a fresh power of re-entry, enacted at full length, adapted to the new provisions contained in the act; in substance, a proviso for re-entry if Mr. *Brandling* does not convey to Casson Close the larger quantity of coals which the act requires, and if he does not sell them at the price limited by the act. Then comes the 33 Geo. 3, c. 86, an act of similar import with the last, and having the same object; requiring a still larger quantity of coals to be conveyed to Casson Close, and authorizing Mr. *Brandling* to receive a still higher price; and in that act the clause of re-entry is again given at full length, adapted to the alterations which are there made as to the quantity, and as to the price. Both those acts also contain a special provision that the right and interest of Mr. *Brandling*, under the lease, shall not cease and determine, but that he shall continue to have the same interest therein, although the coals are sold at the increased price, beyond that limited by the lease. We then come to the last act, the 43 Geo. 3, c. 12. That act, after reciting the several former

acts, and also reciting that it is necessary for the inhabitants of Leeds to have a larger supply of coals, and that they are willing to pay a larger price for them, enacts that the recited acts, and all and every the rights, clauses, powers and agreements, penalties, *forfeitures*, rules, remedies, directions, payments, provisions, articles, matters and things whatsoever, therein contained, *except such parts* of the same as may relate to any exemptions from stamp duties, *and as are thereby varied, altered, or repealed*, shall be, and the same are thereby declared to be in full force and effect. Therefore the clause of forfeiture in the former acts, which regarded only the quantity of coals to be deposited at a particular place, Casson Close, would, if nothing further had been done by this act, have remained in full force, and Mr. *Brandling* must have continued to deposit the coals at that place, and at that place only. But the act goes on to enact, that he may sell and dispose of the coals which shall be deposited in Casson Close, the depository for them, or at any other place near thereto, to be used as a depository for coals instead thereof, and laid up in or upon the depository at Casson Close aforesaid, or at any other place near thereto, to be used as a depository for coals instead thereof, to the inhabitants of Leeds, at a certain specified rate and price. The remaining part of that clause is then copied from the corresponding clause in the former act, providing that Mr. *Brandling's* right and interest under the lease shall not cease and determine, but that he shall continue to have the same interest therein, although the coals are sold at the increased price; not attending to the particular alteration just before introduced with respect to the place of deposit, but using the words "as aforesaid;" which words alone might serve to shew that the new depository might stand in the place of Casson Close. But when we refer to the subsequent parts of this act, we find that wherever afterwards Casson Close is mentioned as the depository, it is followed by the words, "or any other place near thereto, to be used as a depository for coals instead thereof;" and

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though the clause of re-entry is repeated in the same terms as in the former acts, it is with that addition, that when it mentions Casson Close, it goes on to say, or any other place near thereto, to be used as a depository for coals instead thereof. It is clear, therefore, that under this act of parliament, there would be no right of re-entry, on the ground of the coals being deposited at a new place of deposit; and then the only question is, whether that would be a ground of re-entry under the lease. To hold that it would, would, as it seems to me, be to violate the spirit of the agreement between these parties, as expressed by the legislature in the act of parliament. The lease was the mere creature of the legislature from the very first, and has always continued to be entirely under the control of the legislature. The clause of re-entry contained in the lease was altogether unnecessary; for the legislature, in the very first act of parliament, had provided for re-entry in the very event in which it is provided for in the lease. In the subsequent acts of parliament they continue to provide for it, with only that necessary alteration in the two intermediate acts, arising from the increase of the price; and in the last act they provide for it, not with that alteration alone, but with the additional alteration as to the place of deposit. It appears to me, therefore, looking at the whole of these acts of parliament, and taking them altogether, that the legislature did intend, in this last act, to control, not merely the clause of forfeiture in the preceding acts, but also the clause of forfeiture in the lease; for, otherwise, this absurdity would follow, that the original lease having been granted in pursuance of an act of parliament, and with a clause of forfeiture and re-entry corresponding with the terms of that act, the clause in the lease would not be controlled by a subsequent act of parliament, though the same clause in the original act of parliament would be. Such a consequence would be repugnant to good sense; and it is, as it appears to me, impossible for us to put such a construction upon an act of parliament as must produce such an effect. Upon the whole, therefore, I am

of opinion, that the lease has not been forfeited, and that the defendant is entitled to the judgment of the Court.

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BAYLEY, J.—I have entertained very considerable doubts in this case, but after much deliberation, I now feel myself enabled to concur in the view taken of it by my Lord Chief Justice. I consider it an established and highly useful rule, in the construction of all acts of parliament of a local and personal nature, to require that the parties soliciting an act of parliament should state in it plainly, and distinctly, and unequivocally, what they mean, in order that the public on the one hand, and the legislature on the other, may not be taken by surprise, and may not be left in doubt as to the object and effect of the enactment. That rule has not been observed in the present instance, and the non-observance of it has led to much of the perplexity which has attended this case. Looking at the last of these acts of parliament, the 43 Geo. 3, c. 12, the recital would import that the only object of that act was to remedy the inconvenience resulting from the amount of the price to be paid for the coals. So, with respect to the second section, if it had been distinctly and decidedly in the view of the legislature to give, by that section, the power of changing the place of deposit of the coals, I should have expected, not only that such an intention would have been intimated in the recital of the act, but that more definite and express terms would have been used in the clause itself upon that subject. At the conclusion, for instance, I should have expected not only that there would have been the proviso that Mr. *Brandling's* interest in the lease should not cease by reason of his selling the coals at the advanced price, but that some such expression as this would have been added, “and although the said coals shall be deposited at a different place from Casson Close.” Again, I should have expected that there would have been in the act some restriction or regulation as to the place to be substituted for Casson Close. The only

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description that we have is, "any other place near thereto." Now it might be possible for Mr. *Brandling* to select a place near to Casson Close, and yet much less convenient than Casson Close to the inhabitants of Leeds; and by these means to throw upon them an additional burthen, not in an increase of the price of the coals themselves, but in an increase of the expense attending the removal of them from the depository into their own cellars. And, as it seems to me, when once this new act had passed, the inhabitants of Leeds had nothing by which they could protect themselves from such an inconvenience, except the proviso in the lease, which gave the landlords the power of insisting upon the continuance of Casson Close as the depository, not for their own interest, for to them it was quite immaterial where the depository was, but for the interest of the inhabitants of the town. Except, therefore, for the circumstance of the proviso in the lease being connected with the first act of parliament, and being, as I agree that it was, the mere creature of the legislature, and as such liable from time to time to be virtually varied by new clauses in new acts of parliament, I should have been of opinion, that the representatives of Mrs. *Bywater* would have had a right to have said, "You, Mr. *Brandling*, have no power, of your own authority, without our concurrence and consent, to have the language of this proviso varied, except by plain, clear, and unequivocal words in the act of parliament by which it is varied." But the short ground on which my opinion in this case has at last been formed is this, which has been already so forcibly put by my Lord *Tenterden*; I consider the lease as having been made in pursuance of the act of parliament, and that, according to the language of the 31 *Geo. 2*, it could contain such covenants, and such covenants only, as were consistent with the tenor of the act of parliament. Among other things, it was to contain, and does contain, a specific proviso in the very language of the act of parliament itself; a proviso, in my opinion, so long as that act of parliament continued to be the only act in force, of no

operation; because the party had the same power of re-entry under the act of parliament as he had under the lease. The proviso in the lease, until some alteration came to be made in the act of parliament, appears to me to have been a dead letter. It would have been in the lease, virtually, because incorporated by the act of parliament in it, if there had not been a single word in the lease upon the subject. The proviso in the lease, therefore, being made under the powers of the act of parliament, and being binding only so far as it was consistent with the tenor of the act, was not, as it seems to me, a distinct and independent provision, but a provision dependent upon and coextensive with the act, liable, virtually, to be repealed or controlled by any alteration which might be introduced by subsequent acts of parliament. Then what is the effect of the subsequent acts of parliament? The 19 *Geo. 3*, varies the quantity of the coals and the amount of the price, but does not leave the old proviso in force, for it makes a new proviso applicable to the whole quantity required to be deposited under that act. So, the 33 *Geo. 3*, which again increased the quantity and the price, also contains a new proviso, applicable generally to the whole quantity required to be deposited under that act. Then, the last act, the 43 *Geo. 3*, first makes an additional provision in one of the enabling clauses, and then makes an additional proviso; and then the question is, whether that new proviso is not to be considered as having, to all intents and purposes, obliterated and destroyed the provisos in the former acts. The new provision is, that it shall be lawful for Mr. *Brandling* to deposit the coals at the depository at Casson Close, or at any other place near thereto, to be used as a depository instead thereof. Looking at the new act altogether, it is clear, as it seems to me, that it was the intention of the legislature to have one depository for the coals, and one only; that if Casson Close was to be continued as the depository, it was to be so continued not merely for the quantity of coals originally required, but for the additional quantity; but that if Mr.

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Brandling chose to abandon *Casson Close*, and adopt a new depository, he was at liberty to do so, provided he kept at such new depository the whole quantity required by the act. For these reasons I incline to think, that the defendant in this case is entitled to our judgment. The only effect of this decision will be to enter a nonsuit, so that the lessor of the plaintiff, if he is dissatisfied with our opinion, may take the opinion of a Court of Error.

HOLROYD, J.—I am also of opinion that the last act of parliament allowed the substitution of another place near to *Casson Close*, instead of *Casson Close*, as a depository for the whole quantity of coals required by that act to be deposited, any thing in the former acts, or in the lease, notwithstanding. I agree, therefore, that there must be judgment for the defendant.

LITLEDALE, J.—I have not been present during the whole of this argument, but adverting to what took place at the former argument, at which I was present, and also to as much as I have heard of the present argument, and to the opinions expressed by my Lord Chief Justice and my learned brothers, I entirely concur with them, that the judgment ought to be for the defendant.

Judgment of nonsuit.

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Where an auctioneer sells an estate by public auction, and receives a deposit, it is his duty, as the agent of both vendor and purchaser, to retain the deposit until the sale is complete, and it is ascertained to whom the money belongs. Where an auctioneer sold an estate by public auction, and received the deposit, and signed an agreement stating that he acknowledged to have sold the estate, and that he agreed to complete the sale; and the sale was not completed on account of a defect of title:—Held, that the purchaser might recover the deposit in an action for money had and received against the auctioneer, though the latter had paid it over to the vendor, without any notice from the purchaser not to do so, and before the defect of title was ascertained.

issue thereon. At the trial before Lord *Tenterden*, C. J., at the Middlesex Sittings after last term, the case was this.—The defendant was an auctioneer, and the action was brought to recover a sum of money paid to him by the plaintiff, as the deposit upon the price of an estate, which had been knocked down by the defendant, at a public sale, on the 28th of September, 1826, to the plaintiff as the highest bidder. By the conditions of sale, “the purchaser was, immediately after the sale, to pay into the hands of the auctioneer a deposit of £90 per cent. in part of the purchase money, and to sign an agreement to pay the remainder on or before the 1st of November next after the sale. The purchaser was to accept an assignment of the lease without requiring the production or investigation of any other title than that which the lessee held, and any copies of deeds, or office copies of writings, or extracts of writings, or other documents which might be required, were to be at the expense of the purchaser; and if from any circumstance the purchase should not be completed at the time limited, the purchaser was to pay interest on the purchase money, at the rate of £5 per cent. per annum, until the purchase was completed. An abstract of the title was to be furnished at the expense of the vendor, and the expense of the assignment was to be borne by the purchaser.” Immediately after the sale the following agreement was entered into and signed by the plaintiff and the defendant:—“I, the undersigned *William Gutteridge*, do hereby acknowledge to have this day sold by auction, and I, the undersigned *John Gray*, do acknowledge to have this day purchased, the hereditaments and premises comprised in Lot 1 of the annexed particulars of sale, at and for the price and sum of £1080, and have paid a deposit of £226; and we do hereby mutually agree to complete such sale and purchase agreeably to the annexed conditions of sale. As witness our hands, the 28th day of September, 1826, *William Gutteridge*; *John Gray*. Witness hereto, *John Elliott Fox*.” The deposit so received by the defendant was immediately

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paid over by him to the vendor. It afterwards turned out that the estate was charged with an annuity, and the vendor being unable to make out a good title, the plaintiff refused to complete the purchase, and brought this action to recover the deposit. It was urged on the part of the defendant, that as he had paid over the deposit to the vendor immediately upon receiving it, without having received any notice from the plaintiff to retain it, and before any defect of title was discovered, the action could not be maintained. The Lord Chief Justice, however, overruled the objection, and the plaintiff had a verdict.

Follitt now moved for a rule nisi to enter a nonsuit, contending that under these circumstances the action was not maintainable against the defendant. The plaintiff's proper remedy is against the vendor, and not against the auctioneer. The auctioneer was the known agent of the vendor, and had paid over the deposit to his principal, before any breach of the conditions of sale had been committed, and before he had received any notice to the contrary from the plaintiff. He, therefore, is not liable. [*Bayley, J.* He had no right to pay over the deposit at all, until it was ascertained whether the vendor could make out a good title; he was the agent of both parties, and ought to have retained the money for the security of both, until the purchase was completed.] That would undoubtedly have been his duty, if he had received a notice to that effect from the purchaser, or if he had in any way been cognizant of the vendor's defect of title; but, in the absence of both those circumstances, it is submitted, that he was at liberty to pay over the deposit to the vendor, and is not liable to refund it to the purchaser. *Hardacre v. Stewart (a)*, and *Edwards v. Hodding (b)*, seem, in principle, to support this argument. In the first of those cases it was held, that if a person employed as an auctioneer in the sale of any property, has notice that what he is about to sell, does not belong to his principal, and yet

(a) 5 Esp. N. P. C. 103.

(b) 5 Taunt. 815; 1 Marsh. 377.

continues to sell, he is personally liable in an action for the produce of the sale; and in the latter, that an auctioneer receiving money as a deposit on the sale of an estate by auction, *knowing that there is a defect in the vendor's title*, is answerable to the purchaser for the deposit, though he may have paid it over to the vendor; but the decision in both seems to have proceeded upon the ground of notice having been given to the auctioneer, which distinguishes these cases from the present. So, in *Lee v. Munn* (a); where the purchaser of an estate by public auction deposited a sum with the auctioneer as part of the purchase money, until the vendor made out a good title according to the conditions of sale; it was held, in an action to recover the deposit from the auctioneer, that he was not liable for interest, although nearly four years had elapsed from the time of the sale, *on the ground that no demand had been made on him* for the repayment of the deposit. In *Burrough v. Skinner* (b), the defendant, an auctioneer, had sold the plaintiff an interest in land, in respect of which the plaintiff had paid him a deposit. Afterwards, upon discovery of an objection to the title, *and also of some circumstances which ought to have been disclosed at the sale*, the plaintiff renounced the contract, and brought an action to recover the deposit. After verdict for the plaintiff, and motion for a new trial, the Court were of opinion that the action lay against the auctioneer. But the first reason they assigned for that opinion was, *that the money had not been paid over to the principal*; and the second, that if it had been, yet *the objection appeared to have been made before the money was paid over*. Now, in both these respects, the present case is distinguishable from that, and therefore cannot be governed by it. The Court, undoubtedly, in that case, went on to say, that the auctioneer was a stakeholder, a mere depository, and ought not to part with the deposit, till the sale was finished and completed, and it appeared in the event to whom the money properly belonged; but it

(a) 8 Taunt. 45; 1 J. B. Moore, 481.

(b) 5 Burr. 2639.

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may be doubted, how far that doctrine can be upheld. If the auctioneer is a stakeholder, it seems to follow that he is not to be considered the agent of both parties; *Edwards v. Hodding* (a); and therefore that he is not liable in a case like this. In that view of the case, an auctioneer would stand in the same situation as any other person who has received a deposit from one party and paid it over to another; and against such a person it is clear that an action like this would not lie, *Horsfall v. Handley* (b); where it was held that an action for money had and received was not maintainable to recover money paid to a churchwarden for burial dues, which he had paid over to the treasurer of the trustees of a chapel, before the commencement of the action. Suppose an auctioneer receives the deposit upon a sale, and becomes insolvent, the loss would clearly fall upon the vendor; and if so, it follows that with reference to the deposit the auctioneer is exclusively the agent of the vendor, because if he was only a stakeholder, no action would lie under such circumstances by the purchaser against the vendor to recover the deposit.

Lord TENTERDEN, C. J.—I think there is no ground for disturbing the verdict in this case. The defendant sold the estate, and signed the contract of sale. Assuming him, in the first instance, to have been exclusively the agent of the vendor, still it is quite clear that he, like any other agent, had power, if he chose, to bind himself as a principal; and it seems to me that he has done so, for the contract which he signed states that he acknowledges to have sold the estate, and that he agrees to complete such sale, agreeably to the conditions of sale. Such being the language used by the defendant, I consider this contract as one made between the plaintiff and defendant as principals, and that the terms of the contract not being complied with, the defendant is liable to refund to the plaintiff the deposit which he received from him. But, independently of this view of

(a) 5 Taunt. 815; 1 Marsh. 377. (b) 8 Taunt. 136; 2 J. B. Moore, 5.

the case, I am of opinion, upon the authority of *Burrough v. Skinner* (a), that the defendant ought not to have parted with the deposit, until the sale was completed, and it appeared to whom the money belonged. I think it was his duty to keep the money until the sale was completed, without any notice from the plaintiff to that effect; that he committed a wrongful act in paying the money over, and therefore that he is liable to make it good to the plaintiff in this action.

The other Judges concurred.

Rule refused.

(a) 5 Burr. 2639.

Ex parte GOURLAY.

CAMPBELL moved for a writ of *habeas corpus* to bring up the body of Mr. *Robert Gourlay*, for the purpose of his being bailed, he having been some years ago committed to the House of Correction in Cold Bath Fields, by a justice of the peace, under the authority of the statute 39 & 40 Geo. 3, c. 94, s. 3 (b), as a dangerous person, sus-

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(b) Which is in these words:—
“And for the better prevention of crimes being committed by persons insane, be it further enacted, that if any person shall be discovered and apprehended under circumstances that denote a derangement of mind, and a purpose of committing some crime, for which, if committed, such person would be liable to be indicted, and any of his Majesty’s justices of the peace, before whom such person may be brought, shall think fit to issue a warrant for committing him or her

as a dangerous person, suspected to be insane, *such cause of commitment being plainly expressed in the warrant*, the person so committed shall not be bailed except by two justices of the peace, one whereof shall be the justice who has issued such warrant, or by the Court of General Quarter Sessions, or by one of the judges of his Majesty’s Courts in Westminster Hall, or by the lord chancellor, the lord keeper, or the commissioners of the great seal.”

A warrant of commitment, by one justice of the peace, under 39 & 40 Geo. 3, c. 94, s. 3, stating that “A. had been discovered and apprehended under circumstances that denoted a derangement of mind, and a purpose of committing a crime (that is to say, an assault and breach of the peace), for which, if committed, he would be liable to be indicted, and that it ap-

peared to the justice that he ought to issue a warrant for committing him as a dangerous person, suspected to be insane,” sufficiently “expresses the cause of commitment,” within the meaning of the statute.

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pected to be insane. He produced the warrant of commitment, which was in the following words:—

“To the Governor of the House of Correction for the county of Middlesex, or his deputy.

Whereas *Robert Gourlay* hath been discovered and apprehended under circumstances that denote a derangement of mind, and a purpose of committing a crime (that is to say, an assault and breach of the peace), for which, if committed, he would be liable to be indicted; and the said *Robert Gourlay* being brought before me, one of his Majesty's justices of the peace in and for the said county, and it appearing to me that I ought to issue a warrant for committing him as a dangerous person, suspected to be insane; these are therefore to command you and each of you to receive into your custody the body of the said *Robert Gourlay*, herewith sent, as a dangerous person, suspected to be insane, and him safely to keep in your custody until he shall be bailed as directed by the statute in that case made and provided, or until he shall be discharged by due course of law; and for so doing this shall be your sufficient warrant.

Given under my hand and seal this 25th day of June, 1824.
Thomas Halls.” (L. S.)

Campbell.—The warrant is bad; for it does not “plainly express the cause of commitment,” in the manner required by the act of parliament. It does not state in detail the circumstances under which Mr. *Gourlay* was apprehended, and therefore does not lay before the Court any means of judging whether he is a fit person to be bailed or not. The power vested in magistrates by this section of the statute is a formidable, if not a dangerous power; and one which the Court will take care shall be exercised only in cases which come strictly within both the letter and the spirit of the law. It was doubtless with this view that the legislature cautiously introduced the stipulation that the cause of commitment should be plainly expressed in the

warrant; and it is clear that the magistrate in this case has not complied with that stipulation. [*Bayley, J.* The warrant pursues the language of the act of parliament: is not that sufficient?] It is submitted that it is not; and that the act in its spirit means to require something more than the mere recital of its own words. It clearly means that the evidence adduced against the party committed should be set out in the warrant, or, at least, that the warrant should state that there was evidence of a particular nature adduced against him, that he heard that evidence, and that opportunity was given him of refuting or explaining it. This seems apparent from the nature and language of the other three sections of the act of parliament. The first section provides for the safe custody of persons acquitted of felony on the ground of insanity. The second provides for the safe custody of persons arraigned for felony, and relieved from any trial on the ground of insanity. And the fourth provides for the safe custody of persons appearing to be insane, and endeavouring to gain admittance to his Majesty. In all these it is specially provided that the insanity of the party shall appear by the finding of a jury, upon legal and satisfactory evidence produced before them. The third section, which provides for the safe custody of persons, being dangerous persons, and suspected to be insane, does not, indeed, require the intervention of a jury; but it does require that the person shall be discovered and apprehended under circumstances that denote a derangement of mind, and it empowers the magistrate to commit him as a dangerous person, suspected to be insane, "the cause of his commitment being plainly expressed in the warrant:" so that it evidently places the magistrate in the place, and requires him to exercise the functions of a jury; that is, to receive legal and satisfactory evidence in support of the charge made, and to make known by his warrant, as by a verdict, that he has received such evidence, and that the commitment is founded upon and justified by it. Nothing of this sort appears by the warrant in this case, and

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therefore it is submitted that the commitment cannot be justified.

The COURT, after consultation, granted a rule to shew cause why Mr. *Gourlay* should not be bailed, stating that they thought that a more prudent course than granting the writ in the first instance, which would have the effect of bringing into Court a person whose sanity was questioned. On a subsequent day

Campbell again mentioned the case, and having stated that no gentleman had received instructions to shew cause against the rule, moved that it might be made absolute.

The COURT said, that as they had not the assistance of any gentleman at the bar to direct their attention to the points that might be urged against the motion, they must look into the authorities upon the subject, and consider the question on both sides, for themselves: at the same time inquiring of *Campbell* if there were any cases bearing upon the question to which he wished to direct their attention.

Campbell.—There is no case directly in point; but there are some dicta and cases which are analogous to the present, and which seem to support the argument already advanced. It is quite clear that at common law a warrant of commitment, not fully setting out the cause of commitment, would be bad; 2 *Hale's P. C.* 122; 2 *Hawkins's P. C.* c. 16, s. 16; in the latter of which it is said that every warrant of commitment "ought to set forth the crime alleged against the party with convenient certainty, otherwise the Court before whom he is removed by habeas corpus ought to discharge or bail him. And this doth not only hold where no cause at all is expressed in the commitment, but also where it is so loosely set forth, that the Court cannot adjudge whether it were a reasonable ground of imprisonment." A commitment in execution by a ma-

gistrate must state that the party was *convicted*; setting forth that he was charged on oath with the offence is insufficient; *Rex v. Cooper* (a). All general warrants of commitment are illegal. *Money v. Leach* (b). In commitments under acts of parliament, the principle is the same. A commitment under a vagrant act is a commitment in execution, and is bad if it *merely state the charge*, and order the party to be committed for safe custody, without *convicting* him. *Rex v. Rhodes* (c). A commitment in execution of a rogue and vagabond, under 23 Geo. 3, c. 88, must state that the defendant was apprehended with the implements of housebreaking upon him, at the time of such apprehension. *Rex v. Brown* (d). And a commitment of a bankrupt by commissioners of bankrupt, for not satisfactorily answering on his examination is bad, if the warrant does not show clearly what answers were unsatisfactory (e). Upon these authorities it is clear that a warrant of commitment must shew the cause of commitment clearly and fully; which, it is submitted, the warrant in this case has not done, and therefore cannot be supported (f).

(a) 6 T. R. 509.

(b) 3 Burr. 1742.

(c) 4 T. R. 220.

(d) 8 T. R. 26.

(e) See *Ex parte Bagster*, ante, 579; *Dowell v. Impey*, 2 D. & R. 350; 1 B. & C. 163.

(f) Mr. Paley, in his Treatise on Convictions, 2d ed. by Dowling, 251, says "every warrant of commitment must specify the cause; and where it is in execution (which it is in all cases of commitment after conviction), it must allege the party to have been convicted of the offence. *Rex v. Rhodes*, 4 T. R. 220; 2 Inst. 52; 2 Hale, 122. That the rule laid down in that case (*Rex v. Rhodes*) is general, and

not confined to commitments on the particular apt there mentioned, is established by the following: *Rex v. Cooper*, 6 T. R. 509. It is moreover necessary that the offence for which the commitment is made be described with certainty. *Rex v. Everett*, Cald. Cases, 26. *Rex v. North*, 3 D. & R. M. C. 119; *Rex v. Pain*, 3 D. & R. M. C. 517; *Rex v. Sadler*, 2 Chit. Rep. 519." And Mr. Chitty, in his Treatise on the Criminal Laws, 1st ed. 40, says "It does not seem to be absolutely necessary to set out the charge, or offence, or evidence, in a warrant to apprehend, though it is necessary in the commitment."

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Lord TENTERDEN, C. J. (after conferring with the other Judges).—We have considered this case, and are all of opinion that we ought not to grant the writ of habeas corpus prayed for. The object of the clause of the statute in question was to prevent the commission of crimes by insane persons, and to afford due protection to the public, by providing for the safe custody of those, who, by their conduct, may be reasonably suspected to be insane, and therefore dangerous persons. It has been urged, that in order to justify the commitment of a person under this clause, the warrant ought not only to express generally the cause of commitment, but to state in detail all the circumstances under which the party was apprehended, and all the evidence adduced against him before the magistrate; and that the warrant in this case, merely pursuing the words of the statute, does not “plainly express the cause of commitment,” within the true meaning of the statute. We think it would be going too far to adopt that argument. There might be cases in which, from their very nature, it would be impossible for the magistrate to ascertain the particular circumstances with such accuracy, and yet where it would be very desirable for the interest of the public that the act of parliament should be put in force. We think, therefore, that it would be too much to require the same certainty and particularity in a warrant of commitment under this statute, as are necessary in cases of commitment at the common law, and under other acts of parliament; and that this warrant, pursuing the words of the statute, and stating positively and affirmatively, as it does, that it appeared to the magistrate that Mr. *Gourlay* was a dangerous person, suspected to be insane, is sufficient. This rule, therefore, must be discharged.

Rule discharged.



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THIS was a rule calling on the defendant to shew cause, why an information in the nature of *quo warranto* should not be filed against him, for usurping the office of mayor of the borough of Stafford.

The affidavits upon which the rule was granted stated substantially as follows:—

By a charter of 12 *James* 1, it was granted that the borough of Stafford should be a free borough, and that the bailiffs and burgesses should from thenceforth be a body corporate, by the name of the mayor and burgesses of the borough of Stafford; that there should be one mayor, ten aldermen, and ten chief burgesses, which should be called the common council of the borough: and that the rule and government of the borough should be vested in them. This charter was accepted and acted upon by the corporation. The mayor of Stafford is the returning officer at elections of members of Parliament for Stafford. The defendant was elected mayor on the 24th October, 1825, and held the office for one whole year. On the 23d October, 1826, he was re-elected, and held the office for one other whole year. On the 9th and 10th June, 1826, he presided as returning officer at an election of members of Parliament for the borough. A *quo warranto* information was filed against him for usurping the office of mayor under the election of the 23d October, 1826, whereupon judgment of ouster was pronounced in Easter Term, 1827. In the course of the year 1826, six aldermen and five capital burgesses presented a petition, signed by themselves only, to the king, stating, that they were the only remaining aldermen and capital burgesses, and were not sufficient in number to constitute a legal meeting of the corporation for the transaction of business and the government of the borough, and praying for a new charter, investing them and the burgesses of the borough with the same powers and privileges as they had

By a new charter, an old corporation, consisting of a mayor and burgesses, was made to consist of a mayor, aldermen, chief burgesses, and burgesses; the three former to constitute the common council. The common council and a majority of the burgesses expressed their assent to the new charter, some by voting at an election held under it, and others by a written declaration:—Held, that this was a sufficient acceptance of the new charter: and, *quære*, whether a majority of the burgesses need have concurred in such acceptance.

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previously enjoyed under the charter of *James 1.* By letters-patent of 8 Geo. 4, it was granted that the burgesses of Stafford should be a body corporate, by the name of the mayor and burgesses of the borough of Stafford; that there should be one mayor, eleven aldermen, (the mayor being one,) and ten capital burgesses, &c. as in the former charter: and the defendant was nominated the first mayor under the new charter, to continue in office until Monday next after the feast of St. Luke, 1828, and commissioners were appointed to administer the oaths to him. This charter was never accepted, but, on the contrary, was rejected by the burgesses. On the 8th of October, 1827, the commissioners attended, pursuant to notice, at the town-hall, for the purpose of administering the oaths to the defendant. A person of the name of *Flint*, on behalf of several burgesses, then requested that the question of acceptance or rejection of the charter might be put to the burgesses present; but the commissioners refused to do so. Nearly all the burgesses present thereupon withdrew into another room, where the question was put, and it was resolved unanimously that the charter should be rejected. A majority of the burgesses of the borough were present at this proceeding. The defendant and all the other persons named in the new charter as aldermen and chief burgesses, with only one exception, took the oaths on that occasion. On the 11th October following, the defendant acted as mayor, by presiding at the election of a town-serjeant. Forty-nine burgesses polled on that day, when the defendant adjourned the meeting to the 22d, and then again to the 23d, when the election terminated, 262 burgesses out of the aggregate number of 820 having polled. *Flint* called a meeting of the burgesses also on the 11th October, when those assembled again voted unanimously for the rejection of the new charter.

The affidavits in answer to the rule stated as follows:

In support of the petition presented by the surviving aldermen and chief burgesses, another petition was pre-

seated, signed by 500 burgesses, praying that the request in the former might be granted. These petitions were notorious in the borough, and *Flint* procured a counter-petition, and canvassed for signatures to it. The first petition was referred to the attorney and solicitor-general, who held several meetings for taking it into consideration, which *Flint* attended with counsel, and the subject of the new charter was fully discussed by counsel on both sides, and the draft of the proposed new charter was at length settled and agreed to by the counsel on both sides, excepting only the names of the persons who should form the new common council; and as to that, it was ultimately agreed that each party should send to the privy council a list of the names of the persons proposed, and that the privy council should select from both lists the names of such persons as seemed to them most proper. This agreement was acted upon; the lists were sent in: and the new charter was granted, dated 6th September, 1827. The new charter was similar to the old, containing nothing not contained in the draft agreed upon, except the names of the common council, and some regulations as to serving on juries. At the meeting of the 8th October, when the commissioners attended to administer the oaths to the defendant, there were not more than 200 burgesses present, and of them not more than 100 withdrew into the other room upon the refusal of the commissioners to put the question of the acceptance or rejection of the charter, and the charter was not then, or at any other time, rejected by a majority of the burgesses. At the meeting of the 11th of October, for the election of a town-serjeant, a large party, who were not burgesses, attended, and obstructed the proceedings by great violence and tumult, and by threats and insults prevented many burgesses who were desirous of polling from so doing; for which reason, the defendant thought it necessary to adjourn the meeting to the 22d. The business of the election was again greatly obstructed on the 22d in the same manner as before, and also on the 23d, to which day the

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meeting was for the same reason again adjourned. The election terminated on the 23d, and 262 burgesses polled at the election. After the election, it was communicated to the defendant that many burgesses had found it impossible to signify their acceptance of the new charter by voting at the election, in consequence of the violent proceedings above mentioned, and that they were desirous of signifying their acceptance of the charter by some other means; wherefore a book was sent round with a written declaration of assent to the charter, and 129 resident burgesses, and 100 non-resident, who had not polled at the election, signed such written declaration of assent. The aggregate number of burgesses resident and non-resident was 820, of whom about 700 were resident; of those, 391 had accepted the charter, either by voting at the election held under it, or by expressing their assent in writing; and 100 non-residents had also expressed their assent in the latter mode, making an aggregate number of 491 out of 820.

Tindal, S. G. and *Russell*, Serjt. shewed cause. The question in this case turns on the validity of the defendant's election, which is impeached on two grounds. First, that if he was elected under the new charter, his election is void, because that charter was never duly accepted by the corporation; and, secondly, that if he was elected under the old charter, his election is void, under the statute 9 *Anne*, c. 20, s. 8, as being a re-election within the prohibition of that act. First, the general rule of law with respect to the necessity of the acceptance of a charter, can scarcely be held applicable to a case attended by the peculiar circumstances disclosed by the affidavits here; but if it can, still the new charter has been duly accepted, within the true spirit and operation of that rule of law. Undoubtedly, the individuals named by the crown in the new charter as the first officers of the corporation, were at liberty to reject that charter if they thought proper. But in this case all the governing officers of the corporation have accepted the charter,

and the subsequent rejection of it by others, afterwards admitted into the corporation, cannot operate to annul its previous acceptance, because, until they have been actually admitted, those other persons have no right or power either of rejecting or accepting the charter. This is clear from the language of the Court in *Rex v. Askew* (a). *Yates, J.* there said, " Upon this application of the licentiates, grounded on their not being admitted to vote, it was incumbent upon them to shew that they had a right to vote. They claim to be members of the corporation, equally with the fellows of the college: they insist that the charter has made them so. And it has been said that there is no other way of continuing the corporation, and that no bye laws or usage can contravene the express words of the charter. But I am far from thinking that all the men of and in London then practising physic were incorporated by the charter. The immediate grantees under the charter were the six persons particularly named in it; the rest were to be admitted by them. They were not *ipso facto* made members. They were first to give their consent before they became members: they could not be incorporated without their consent. Much less are future practisers of physic, of and in London, actually incorporated by this charter. If the inhabitants of a town are incorporated, yet every one must be admitted before he becomes a corporator. The crown cannot oblige a man to be a corporator without his consent: he shall not be subjected to the inconveniences of it, without accepting it and assenting to it. Upon moving for an information in the nature of a *quo warranto*, against a corporator, it is necessary to prove that the corporation has accepted." And *Ashton, J.* " agreed that no person can be obliged to be a member of a corporation without his consent: and he allowed that the charter included only such persons as accepted and assented to it." It follows from these observations that the persons not named in the charter, and not admitted into the corporation at the

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(a) 4 Burr. 2200.

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time when the charter was accepted by those who were named in it, are not corporators, and have no voice or power to come before the Court and ask for a *quo warranto* information against a corporator. Then, there is abundant evidence in this case of an acceptance of the charter by those who were qualified to accept it. In *Rex v. Amery (a)*, *Ashurst, J.*, speaking of the question of the acceptance of a new charter, said, "It could only be accepted by the persons to whom it was directed at the time it was made. If the jury had been of opinion that the charter had been accepted and acted upon during those three years, (to which the evidence in that case applied,) that would have been conclusive. For the charter once accepted, and acted under for three years, was accepted as much as it could be, and must ever afterwards be taken to have been accepted." And *Buller J.* said, "If the corporation accepted the charter, *only for an hour*, that is conclusive for ever; it cannot afterwards be said that they had not accepted. Another objection has been made, that it does not appear that the charter was accepted by a majority of those named in it. I am by no means satisfied that it was necessary that it should be accepted by a majority of them." His lordship then referred to the case of *Rex v. Ashew (b)*, and to the observations of the learned judges there above cited; and then added, "if any number of freemen had accepted, it would have been sufficient; for the freemen are an indefinite body. And in a corporation consisting of different integral parts, if any of the freemen, being an indefinite body, attend the meetings of the corporation, it is sufficient. It is not required in all cases, that a majority of the whole body should be present. And if a smaller number than a majority of an indefinite part of a corporation be sufficient to constitute a lawful assembly for doing corporate acts, after they are incorporated, it will be difficult to find a reason why the same number may not accept the charter." So, in *Rex v. Pasmore (c)*, Lord

(a) 1 T. R. 575.

(b) 4 Burr. 2200

(c) 3 T. R. 199.

Kenyon said, "has this new charter been accepted or not? The majority of the grantees are stated to have accepted it; and the refusal by a few of the body was certainly not sufficient to repel the acceptance of the rest." Such being the legal principles bearing upon the question, what are the facts here? With only one exception all the persons nominated by the new charter accepted it; and no fewer than 262 burgesses attended at a corporate meeting which was held under the charter, and there voted at the election of a corporate officer. It is sworn that many others would also have voted, and so expressed their acceptance of the charter, but were prevented by violence from so doing; upon which they expressed their acceptance in another way, namely, by signing a written declaration of their willingness to accept it. The law does not prescribe any particular mode of acceptance; consequently, any plain unequivocal expression of a willingness to accept a charter ought to be deemed sufficient. The written declaration of assent was signed by 129 resident and 100 non-resident burgesses; and the result is, that the charter has been accepted by all the definite bodies, one individual excepted, and by a majority both of the resident and of the non-resident burgesses. Secondly, this was not a re-election, within either the letter or the spirit of the prohibitory clause of the statute of *Anne*. That clause provides, that no person who has been in an annual corporate office for one whole year, shall be capable to be *chosen* into the same office for the year immediately ensuing. Here the defendant was not *chosen* into the office; he was appointed to it by the crown in the new charter: an appointment which the crown had power to make, notwithstanding the act of parliament.

Campbell, *contra*. The new charter is void for non-acceptance; therefore the election of the defendant under it is void also. There is no doubt that where a corporation is in the circumstances stated upon the affidavits here, the crown has power to grant a new charter; but it is equally

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clear that the corporation are not bound to accept such charter when granted, but are at liberty, if they think fit, to reject it. Here the corporation have rejected the new charter: they thought it fit to do so; and they had good reasons for their opinion. The parties nominated by the crown, in the new charter, were objectionable to the great majority of the old corporation; and the old corporation was still subsisting; it was not dissolved generally; it was only a particular part of it that had become extinct. There was no acceptance of the new charter by the majority of the old corporators, either in point of law or of fact. That an acceptance was necessary in point of law has not been denied; nor could it be: *Rex v. Pasmore* (a), *Bagge's* case (b), and all the cases and law writers upon the subject, are decisive in support of that proposition. If this rule is made absolute, the defendant must plead, in answer to the information, that the new charter was accepted. *Bagge's* case. Then the question is, what is acceptance, and by whom, and in what manner, must it be notified and expressed? That is a question of great importance, and of considerable difficulty; both which circumstances furnish strong arguments in favour of this application: for the Court will not feel disposed to decide *such* a question upon a motion of this kind, and upon contradictory affidavits. At all events, an acceptance by a select body, part of the corporation, was not sufficient. The acceptance ought to have been by a majority of the burgesses constituting the old corporation, and should have been notified at a meeting of those burgesses legally convened. [*Bayley, J.* How was it possible, in your view of the case, that such a meeting should be legally convened? If there was no acceptance of the charter, there was no mayor of the borough in existence; and if there was no mayor, there could be no legal meeting of the corporation.] It is submitted that there might, because the old corpora-

(a) 3 T. R. 199.

(b) 1 Rol. Rep. 226; 2 Brownlow, 100.

tion was not dissolved. The former charters prove incontrovertibly that this was an immemorial corporation; that appears especially from the language of the charter of *James*; and that charter was never legally surrendered. The corporation of Colchester was, for a period of twenty-three years, in a state similar to that of this corporation, as appears from the report of a case of the *Mayor, &c. of Colchester v. Seaber (a)*. It was there decided that a corporation being disabled to act, accepting a new charter, is not dissolved, but dormant; and after such acceptance, the new corporation is the same as the old was. The facts of that case were, that in 1740 there was judgment of ouster against all the persons then claiming in fact to be mayor and aldermen of the corporation. All those persons died before 1763. Between 1740 and 1763, no person in fact took upon himself, or claimed, to be a mayor or alderman of the corporation. In 1763 a new charter was granted and accepted. Lord *Mansfield* there said, and the whole Court concurred in opinion with him, "Many corporations, for want of legal magistrates, have lost their activity, and obtained new charters. It has never been disputed, but that the new charters revive and give activity to the old corporation; except perhaps in one case (*b*); where the corporation had a new name; and even there the Court made no doubt. The corporation is not dissolved by the judgment of ouster, and death of the mayor and aldermen; though they are without their magistracy, their constitution is not destroyed and gone; their former rights remain. Notwithstanding the judgment of ouster, a right may remain, so as to be capable of being again raised and revived. The corporation cannot act without legal magistrates; but their rights may be revived, and put in action again, by a new charter from the crown, giving them legal magistrates. I am clear, upon principles of law, that the old corporation was not absolutely dissolved and annihilated, though they

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(a) 3 Burr. 1866; 1 Bl. 591.

(b) *Corporation of Risorborough v. Butler*, 3 Levinz. 238.

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had lost their magistrates." That case shews that the old corporation in this case was not dissolved, but is still subsisting under its former charter; from which it follows that those burgesses, or a majority of them, were the only persons capable of accepting or rejecting the new charter. They formed the corporate body at large, and they could not be bound by the acceptance of a select body. The charter is directed to the burgesses at large, and they are the only proper parties to accept or reject it. There should have been notice given of a meeting of the burgesses at large; and then if they had met, and a majority of them had agreed to accept the charter, the proceedings would have been regular. That not having been done, the question is, has there been an acceptance by a majority of the burgesses at large. There clearly has not. Certainly there was no such acceptance before the defendant was sworn into his office, nor *eo instanti*, when he was sworn in. Under what authority, then, can he claim to act, having been sworn in before the charter was accepted? The affidavits in support of the rule, and those in answer to them, are extremely contradictory and inconsistent upon the subject of the number of those who really expressed, in any way, their desire to accept the new charter; but that furnishes the strongest reason why the Court should not decide the question upon motion, but send it to be tried by a jury, the legal and constitutional tribunal for disposing of such a question. Even if all the burgesses had polled at the election, that would not have constituted a good acceptance of the charter, because that polling was not, strictly speaking, a corporate act, by which alone the acceptance of a charter can be expressed. Still less can the signing a written paper, purporting to be an agreement to accept the charter, be considered as a corporate act, or as forming a legal mode of expressing the acceptance of the charter. Upon the other point it is submitted, that the defendant's election was void, by the provisions of the statute 9 Anne, c. 10, s. 8. He served the office of mayor in 1825; he was re-elected

in 1826; he was then ousted, and afterwards appointed by the crown, under the new charter. Such an appointment was, to all intents and purposes, a re-election within the prohibition of the act of parliament, and as such, illegal and void. [*Bayley, J.* His re-election in 1826 was illegal, and upon that ground he was ousted: his appointment under the new charter had nothing to do with that.] That appointment made him mayor *de facto* within the time prohibited by the statute, and therefore brought him within its operation.

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Lord TENTERDEN, C. J.—I am of opinion that this rule ought to be discharged. The corporation of this borough of Stafford appears originally to have consisted of about 820 persons, of whom about 700 were resident. Other persons could acquire the right to become burgesses by birth and servitude. A charter, of the 12 *James* 1, vested the government of the borough in the mayor, ten aldermen, and ten capital burgesses. By some means, which have not been explained to us, these definite bodies became so far reduced that they were no longer competent to hold any election, or to perform any other corporate acts, and the government of the borough was consequently dissolved and gone. Whether the result of this state of things was that the crown might, by *quo warranto*, have dissolved the corporation, we need not on the present occasion decide; but I admit, that in the absence of any such proceeding the existing corporators continued to retain their original rights, though they had not the power of performing the duties imposed upon them by their charters; and they could retain those rights only for the period of their own lives, at the termination of which the existence of the corporation would have terminated also. Such being the state of the corporation, petitions for a new charter were presented to the crown; one signed by all the surviving members of the definite and governing bodies of the old corporation, and another by 500 of the indefinite body of burgesses. A counter-peti-

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tion was also presented, signed by a smaller number, who employed *Flint* as their attorney. These parties, attended by their counsel, met before the law officers of the crown, to whom the matter had been referred, and there agreed upon the form of the new charter. The nomination of the first mayor and other officers of the corporation then belonged to the crown, to whom each party sent in a list of names, from which the crown made a selection. The new charter having been granted under these circumstances, the single question for our decision to-day is, in what mode or form the burgesses were bound to signify their assent to the new charter? It has been argued that there ought to have been a public meeting, at which the question whether the charter should be accepted or not, ought to have been put; and, undoubtedly, if that course was absolutely necessary, there has been no acceptance of the charter. No instance, however, of such a meeting has been shewn; nor has any case or dictum, shewing the necessity of such a meeting, been cited. It has long been the received opinion that an acceptance is necessary; but the question how that acceptance ought to be notified has been always left open. Generally speaking, the acceptance of a charter is proved by evidence of acting under it; which would be equally good evidence in the case of a new and of an old charter. It appears upon the affidavits in this case, that when the commissioners attended for the purpose of administering the oaths, there was also a meeting attended by a considerable number of burgesses. As to the number of persons who signified their assent to the charter upon that occasion, the affidavits, unfortunately, are contradictory. A few days afterwards, it appears, a larger body attended at a meeting convened by *Flint*, and resolved to reject the charter. But that resolution, so expressed, was not binding on any one of the party; they might, any or all of them, subsequently have altered their minds, and have resolved to accept the charter. In point of fact, what was the next step? On the 11th of October there was a meeting held for the elec-

tion of a corporate officer. Many of the voters were violently obstructed, and prevented, by insult and threats, either from attending or from voting. The meeting, in consequence, was adjourned. The same course was pursued at the adjourned meeting, and a second adjournment was found necessary. Eventually, however, 262 burgesses actually polled at this election, and they, by that act, clearly signified their acceptance of the charter. It is further sworn that a larger number would have attended and have polled at the election, but for the violent obstructions offered to the proceedings; and that a written declaration of assent was in consequence prepared, and privately circulated among the burgesses, 129 of whom, besides the 262 who voted at the election, signed that declaration. Now, those two numbers together constituted a majority of the resident burgesses, and it is added that 100 of the non-resident burgesses, who formed a majority of that body, afterwards signed the same declaration. If these facts be true, the charter has really been accepted by a majority of the whole body. It has been urged, and truly, that to allow the acceptance of a charter to be procured and expressed in this private manner, would be to open a door to corrupt and fraudulent practices; but if those who wish to notify their acceptance publicly are prevented from so doing by threats and violence, I know of no other mode by which they can counteract that injustice, than by notifying their acceptance privately. We are not, therefore, in this case, called upon to decide that *an* acceptance of a charter is not necessary, nor that acceptance by a reasonable portion of burgesses would be sufficient; although much might be said in support of the latter proposition. My opinion is founded upon this, that in the absence of any known and settled mode of notifying the acceptance of a charter, that which has been done in the present case is reasonably unequivocal and sufficient. As to the other objection that has been raised against the defendant's title, I think it is perfectly clear that the statute of 9 *Anne*, c. 20,

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has no sort of application to his case. It was intended merely to prevent the re-election of certain corporate officers, and is certainly not binding on the crown, though, undoubtedly, it may form a proper subject for consideration when a new mayor is to be appointed. The particular period also of the defendant's becoming mayor seems to me perfectly immaterial: that point was not mentioned when the rule was moved for: and as the affidavits, upon which the rule was granted, have not fairly and fully disclosed all the facts of the case, but have improperly suppressed many of them from the Court, I am of opinion that the rule ought to be discharged *with costs*.

BAYLEY, J.—I entirely concur with my Lord Chief Justice in the view he has taken of this case upon both points. I take it to be now settled that there must be an acceptance of a charter; and I think there has been a valid acceptance of this charter by a majority of the persons to whom it was addressed. It is not immaterial to consider what was the state of this corporation at the period when the new charter was granted. Under former charters there was a local government for the borough, but that was neglected and gone. It is said that the surviving *burgesses*, nevertheless, retained all their rights and privileges; and for certain purposes, I admit, they might do so; but the corporation having, by its own negligence, become incapable of performing its duties, and having lost its governing body, was, in my opinion, liable to be dissolved by *quo warranto*. Those *burgesses* who in the first instance, at a meeting disturbed by violence and tumult, voted for the rejection of the charter, might very naturally change their opinion, and wish to accept the charter, when they came to learn that the corporation might be dissolved, and all their rights and privileges under former charters annihilated: and in point of fact, very shortly afterwards, a majority of the whole body of *burgesses* did signify their acceptance of the charter, either by a written declaration, or by voting at an elec-

tion held under it. No authority has been cited, nor can any, I believe, be found, which prescribes any particular mode in which the acceptance of a charter must be expressed; and in the absence of all such authority, it seems to me that enough was done in this case to constitute a valid acceptance of the charter, and therefore that the defendant is lawfully entitled to hold the office of mayor of this borough. I agree, therefore, that this rule must be discharged, and, for the reason pointed out by my Lord, with costs.

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HOLROYD, J.—There can be no doubt that the crown had a right to revive this almost defunct corporation, by granting them a new charter, and by filling up their definite bodies, which were so much reduced as to be incapable of discharging their corporate duties. Then, when a new charter was offered by the crown to the corporation, it was not requisite to call a corporate meeting for the purpose of inquiring whether it should be accepted or rejected; the acceptance of it by the parties to whom it was addressed was sufficiently expressed by their acting under it. With respect to the statute of *Anne*, that clearly does not apply to an appointment by the crown under a new charter; and besides, the defendant, when he was appointed by the crown, was not in fact mayor; for though he had been elected for that year, he had been afterwards ousted by *quo warranto*.

LITLEDALE, J.—I am entirely of the same opinion. The corporation were reduced to a situation in which they were no longer capable of performing their corporate functions. Their liberties might have been seized by the crown; but instead of that, a new charter was granted them. The crown, by that grant, recognized the burgesses as still existing, and nominated new corporate officers. Then, in order to make the new charter binding upon the corporation, an acceptance of it by them became necessary,

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and the first question is, by whom that acceptance must be declared? It has been urged on the one side, that acceptance by the persons named in the charter, or by those who chose to come in and take the oaths under the charter, is sufficient; and, on the other side, that nothing short of an acceptance by the burgesses at large is sufficient. I certainly think that an acceptance by those named in the charter only, is not sufficient; but I have no doubt that an acceptance by them, together with a majority of the burgesses, is sufficient: and I do not mean to express a decided opinion that a majority of the burgesses must concur. The next question is by what mode the mind and will of the parties upon the subject is to be ascertained? In some respects it might be convenient to hold a public meeting for that purpose, but there is clearly no authority for saying that it is necessary. In some respects such a course might be inconvenient, and in many cases it might be impracticable. In any view of the case, I am of opinion that any unequivocal act of the parties, expressive of their desire to accept the charter, and to be governed by it, is sufficient. Here that desire was expressed, either by voting at an election, or by a written declaration, by a majority of the burgesses, and that I think constituted a valid acceptance of the charter.

Rule discharged, with costs.

GREENSLADE v. DOWER and COLEMAN.

J. L. 7 13 p. 636.

A joint interest in and occupation of a farm by two persons, is not a partnership, so as to convey to each an implied authority to bind the other by the acceptance of bills of exchange for payments in respect of the farm.

ASSUMPSIT by the plaintiff, as indorsee of certain bills of exchange, each for 100*l.*, some at six and others at twelve months' date, drawn by one *Willoughby* upon the defendants, and accepted by *Dower* for himself and *Coleman*. *Dower* suffered judgment by default. *Coleman* pleaded

Dower suffered judgment by default. *Coleman* pleaded

non-assumpsit. At the trial before Lord *Tenterden*, C. J., at the adjourned Middlesex sittings after last term, the case was this:—On the 11th of October, 1824, *Coleman*, on behalf of himself and *Dower*, entered into an agreement with one *George*, an auctioneer, for the hire of a farm then in the occupation of *Willoughby*, the drawer of the bills, and for the purchase of the stock and crops, at a valuation. By the agreement, which was signed by both *Dower* and *Coleman*, it was stipulated that the amount of the valuation should be paid for partly in cash and partly in good bills, at *three* months. *Coleman* afterwards fell ill, upon which *Dower* represented to *George* that the purchase could not be completed in three months, and entered into a fresh agreement with him, in pursuance of which the bills in question, being at *six* and *twelve* months, were drawn, and accepted by *Dower* in the names of *Coleman* and himself. After the bills had been thus given, *George* saw *Coleman*, and communicated to him that part of the purchase money had been paid in bills, upon which *Coleman* said, it ought all to have been paid in money, for that *Dower* had received 1200*l.* to pay it with; and that *Dower* and himself had been jointly interested in the management and profits of the farm. It was contended for the defendant that the plaintiff must be nonsuited, inasmuch as there was no evidence to shew that *Coleman* had authorized the acceptance of the bills in question, or even that he knew of their existence; that the only agreement to which *Coleman* was a party, or by which he could be bound, was that for the payment of the purchase money in cash and by bills at *three* months; and that his being jointly interested with *Dower* in the farm, did not so completely constitute them partners, as to make the one liable to pay bills accepted by the other without his knowledge or authority. For the plaintiff it was insisted, that as both the defendants had signed the original agreement for the hire of the farm and the purchase of the stock, and were jointly interested in the management and the profits of the farm, they were, to

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all intents and purposes, partners through the entire transaction, and as such were bound by each other's acceptances; that the law affecting partners, and the authority of one partner to bind the other, were not confined to mere trading firms, but arose out of the intimate nature of the connection and communications subsisting between the parties; and, consequently, that they applied as forcibly to persons who were partners in a farming business, as to partners in any other sort of trade, and therefore rendered the defendant *Coleman* liable in this action. The learned Judge said he thought the plaintiff ought to be nonsuited. Parties taking bills, took them subject to the chance of being able to prove their acceptance. The question in the cause was, whether there was evidence to go to the jury of any authority from *Coleman* to *Dower* to accept the particular bills sued upon, so as to render *Coleman* liable upon such acceptance. It was clear that the original contract for the price of the farm and the purchase of the stock was made by *Coleman*; that he represented that *Dower* was to have an interest; and that in point of fact both the defendants were jointly interested in the farm. But taking that to be so, still was there enough to shew that *Coleman* ever authorized *Dower* to accept the bills, with which he was sought to be charged in the action? By the original agreement the bills were to be at *three* months' date; but *Coleman* was taken ill, and in his absence, and without his knowledge, an arrangement was made for bills of a longer date. It did not appear that *Coleman* was ever fully acquainted with the particulars of the bills; he was only told that part of the money had been paid by bills, to which he replied, it ought all to have been paid in money. How was it possible, from such facts, to draw the conclusion that *Coleman* had authorized *Dower* to accept those bills? The plaintiff was accordingly nonsuited.

Brougham now moved for a rule *nisi* to set aside the nonsuit and for a new trial, relying upon the same line of

argument urged at the trial, to establish the defendant *Coleman's* liability.

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LORD TENTERDEN, C. J.—I think we ought not to grant any rule in this case. The bills were drawn on both the defendants, but were accepted by *Dower* alone, in the name of both. *Coleman* was the person originally contracting, and he signed the original agreement. By that agreement he was bound; but by that only, because that contained the terms upon which he intended to contract. That agreement did not authorize the accepting of any bills of a longer date than three months; and *Willoughby*, who took the bills, was acquainted with the contents of the agreement. The agreement is for bills at three months' date; the bills accepted are at six and twelve months' date: and what authority was there from *Coleman* to *Dower* to accept such bills? There was clearly no express authority, nor was there, in my opinion, any implied authority; for the subsequent joint occupation of the farm by both, from which alone such an authority could be implied, cannot relate back to the previous period when the bills were accepted.

BAYLEY, J.—I am clearly of opinion that the plaintiff is not entitled to recover upon these bills against the defendant *Coleman*. *Willoughby* may still have a right of action against him upon the original agreement; but what right of action has the plaintiff? Clearly none, unless *Dower* had from *Coleman* an authority, express or implied, to accept these bills. Had he any such authority? I think clearly not. Where persons are partners generally, an authority to accept bills may be implied; but here the partnership, even if it had been a general one, which it was not, had not commenced when the bills were accepted. As to any express authority, it is plain there was none, for the bills are of a different date from that specified in the agreement,

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by the terms of which alone the defendant *Coleman* was bound.

HOLROYD, J.—It is quite clear that *Dower* had no authority from *Coleman*, either by law or in fact, to accept such bills as these. There was therefore no question for the jury, and the nonsuit was right.

LITLEDALE, J., concurred.

Rule refused.

BENNETT v. WOMACK.

Under an agreement to accept an assignment of a public-house lease, subject to a net yearly rent and to common and usual covenants, the party cannot refuse to accept an assignment, on the ground of a covenant, on the part of the tenant, to pay sewers' rates and land tax. Nor is it any defence to an action on the agreement that the lease contains a proviso for re-entry, in the event of the

ASSUMPSIT upon an agreement in writing to take, at the price of 270*l.*, an assignment of a public-house lease, subject to a net yearly rent of 27*l.* and to *common and usual covenants*. At the trial at Guildhall (*a*), before Lord *Tenterden*, C. J., at the sittings after last Michaelmas term, the lease appeared to contain a covenant on the part of the tenant to pay the net rent, together with land tax, sewers' rates, and all taxes, and also a proviso for re-entry in the event of the premises being applied to the carrying on of any business except that of a victualler. It was stated by a witness conversant with the trade, that such a proviso is to be found in six public-house leases out of ten. On the part of the defendant it was contended, that he was not bound under the agreement to accept a lease containing such a covenant or such a proviso. The learned judge directed a verdict for the plaintiff, with liberty to the defendant to move for a nonsuit.

(*a*) Counsel for the plaintiff, *Scarlett*, A. G., and *Chillon*; for the defendant, *F. Kelly*.

premises being applied to the carrying on of any business except that of a victualler, when it is proved that the major part of such leases contain such a proviso, and no objection was taken on this ground until the trial.

F. Kelly now moved to enter a nonsuit, upon the liberty reserved. The covenant to pay land-tax and sewers' rates is not an usual covenant. The expression in the agreement, "net yearly rent," upon which much stress was laid, must be understood to mean a clear yearly rent, subject to other ordinary covenants. [*Bayley, J.* There must be covenants to make the rent "net." The occupier would be liable to pay the rates in the first instance, and, but for the covenant, he would have a right to deduct the payment from his rent.] The sewers' rate is to be paid by the landlord (a). [*Bayley, J.* Your authority shews that the rate is not of necessity to be entirely paid by the landlord.] If the commissioners may in the first instance assess the landlord, and the tenant is bound under such a clause as this to repay him the amount, he may be compelled to pay for the erecting of party walls. The second question is, whether the defendant was bound to accept a lease containing this clause of re-entry. In *Church v. Brown (b)*, Lord *Eldon* said—"The safest rule for property is, that a person shall be taken to grant the interest in an estate which he proposes to convey, or the lease he proposes to make; and that nothing, which flows out of that interest, as an incident, is to be done away by loose expressions, to be construed by facts more loose; that it is upon the party who has forborne to insert a covenant, for his own benefit, so shew his title to it; and that it is safer to require the lessor to protect himself by express stipulation, than for courts of equity to hold, that contracting parties shall insert, not restraints, expressed by the contract or implied by law, but such, more or less in number, as individual consequences shall from day to day prescribe as proper to be imposed upon


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(a) *Callis*, 141, 3.

(b) 15 Ves. jun. 268. There the question was as to the terms in which the owner of the fee had bound himself to grant a lease, not

as to the form in which an existing lease might, under all the circumstances of the case, be reasonably expected to be found to be framed.

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the lessee; and that all those restraints, so imposed from time to time, are to be introduced as the aggregate of the agreement." Every thing which is there said applies to the present case. The witness proved that six leases out of ten contained such a proviso; but this evidence was not admissible, and does not prove that the covenant is an usual one. Lord *Eldon* cites *Henderson v. Hay(a)*, where it was held that the vendor was not entitled to insert a clause which would diminish the common law right. [Lord *Tenterden*, C. J. You do not take your objection at the time, and afterwards you make the point by surprise upon the plaintiff, at the trial.]

LORD TENTERDEN, C. J.—There is no weight in the objection as to the covenant to pay the sewers' rate and land tax; those are usual covenants with reference to a net rent. A covenant not to use the premises for any other trade must be understood with reference to the circumstance that this was a lease of a public-house. The objection is not made till the trial, when the plaintiff does not come prepared to meet it. The existence of such a clause in six cases out of ten, is reasonable evidence when a party is not prepared to meet such an objection.

BAYLEY, J.—A lease, at a net rent, would be expected to contain covenants which would clear the rent from all deductions. The defendant was informed that the lease contained *usual* covenants, which does not mean covenants *universally* inserted. That which is found in sixty leases out of a hundred is an usual covenant. If in the greater number of instances this clause is inserted, a party entering into such a contract is bound to know it.

HOLROYD, J.—"Net rent" disposes of the first objection. Then there was sufficient evidence that the clause of

(a) 3 Bro. C. C. 632.

re-entry is usual : it is to be found in six leases out of ten; and it is a beneficial proviso with reference to property of this description.

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LITLEDALE, J., concurred.

Rule refused (a).

(a) And see *Morgan v. Slaughter*, 1 Esp. N. P. C. 8; also *overruled*, 15 Ves. 531; *Vere v Loveden*, 12 Ves. 170; *Liebenrood v. Vines*, 3 Meriv. 15.

GOLDING and others v. FENN.

FEIGNED issues were directed by this Court upon the hearing of a motion made by the plaintiffs, who were churchwardens of the parish of St. Martin in the Fields, in the county of Middlesex, for the years 1820, 1821 and 1822, for a writ of prohibition to prohibit further proceedings in a suit in the Court of the Bishop of London, brought by the defendant against the plaintiffs to compel them to exhibit their accounts there. The first count stated the question to be, "whether on the 1st of April, 1825, there was, and from time whereof the memory of man is not to the contrary had been, a vestry of the said parish, composed of [a certain] (a) select [number of] persons, parishioners of the said parish for the time being." The question in the second count was, "whether there was, and from time whereof, &c. had been, a certain laudable custom, used and approved of in the said parish, that the accounts of the churchwardens of the said parish, for the time being, have been, and still of right ought to be, audited and passed at a vestry of the said parish, composed of [a certain] select [number of] persons, parishioners of

A select vestry, consisting of an indefinite number, may legally exist by custom. Such custom, though it may, perhaps, imply that there must always be a reasonable number with reference to the circumstances of the parish, is not abrogated by the acceptance of and long acquiescence in a faculty, by which the Ordinary grants and confirms a select vestry, fixes the number at forty-nine, and appoints certain individuals, amongst whom are some of the former vestry, to be vestrymen.

(a) The declaration was originally delivered with the words in brackets, which were afterwards struck out by amendment.

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the said parish, for the time being, and not by the minister and inhabitants at large of the said parish, in vestry assembled." The question stated in the third count was, "whether there then was, and from time whereof, &c. had been, a certain laudable custom used and approved of in the said parish, that the accounts of the churchwardens of the said parish, for the time being, have been, and still of right ought to be, audited and passed at a vestry of the said parish, composed of [a certain] select [number of] persons, parishioners of the said parish for the time being." The question in the fourth count was, "whether there was, and from time whereof, &c. had been, within the parish aforesaid, in the county aforesaid, a vestry of the said parish, composed [of a certain number] of select persons, parishioners and inhabitants of the said parish for the time being, called a select vestry, which select vestry for the time being, during all the said time immemorial, on Easter Monday in every year, had been accustomed to nominate and elect, and of ancient right and custom ought to nominate and elect, two parishioners and inhabitants of the said parish to be and serve the office of churchwardens of the parish aforesaid, for one year then next ensuing, which persons being parishioners and inhabitants of the said parish, so nominated, elected and chosen by the said select vestry, and none others, had, for and during all the time aforesaid, been duly sworn into and served and executed, and by right of custom ought to have served, the office of churchwardens of the said parish." The plea confessed the wager, and traversed the custom in each count, in the usual form. At the trial before Lord *Tenterden*, C. J., at the sittings after Easter term, 1827 (*a*), the plaintiffs produced and read entries in the parish books in the years 1576, 1577, 1590, 1592, 1593, 1594, 1595, 1596, 1597, 1598, 1606, 1609, 1610, 1612, 1613, 1614, 1615, 1616, 1618, 1619, 1620, 1623, 1626, and 1628, from which it appeared that the

(*a*) Counsel for the plaintiffs, *Tindal*, S. G., *Gurney*, *W. E. Taunton*, and *Barnewall*; for the defendants,

*Scarlett*, A. G., *Brougham*, and *J. Evans*.

affairs of the parish had been managed by a select body, but of a fluctuating and indefinite number. One of these entries stated that a party was fined "according to ancient order." They also produced, from the chapter-house at Westminster, a feoffment of the year 1225, and a charter of the year 1251: also Pope *Nicholas's* Taxation, and the *Nonæ Rolls*, 14th *Edw.* 3, 1339, in all of which the parish of St. Martin in the Fields is recognized. The plaintiffs also produced three records of this Court. The first, a judgment in H. T. 15 *Geo.* 2, *Kendal v. Penrice*, which was an action for a false return, against the Official of the Archdeacon of Middlesex. The plaintiff and one *Tucker* had been elected by the parishioners at large; whilst the same *Tucker* and one *Wood* were chosen by the select vestry. The defendant having refused to swear in either set of churchwardens, both obtained writs of mandamus; upon which defendant swore in *Tucker* and *Wood*, and returned upon the plaintiff's mandamus, that he had already sworn in the churchwardens elected by the select vestry. A verdict was found and judgment given for the defendant. The second record was upon a feigned issue between *Ferrers* and *Nind*, H. T. 17 *Geo.* 2, to try whether there then was, and from time, &c. had been, a vestry of the said parish, composed of a *certain select number* of persons, parishioners of the said parish for the time being; which issue was found for the plaintiff, *Ferrers*, establishing the custom. The third record was of an action in prohibition, in which the declaration stated that there was, and from time whereof, &c. had been, within the parish of St. Martin in the Fields, in the county of Middlesex, a vestry of the said parish, composed of a *certain number* of select persons, parishioners and inhabitants of the said parish for the time being, called a select vestry, which select vestry for the time being, during all the said time immemorial, on Easter Monday in every year, had been accustomed to nominate and elect, and of ancient right and custom ought to nominate, &c. two parishioners and inhabitants of the said parish, to be and serve the office of churchwardens to the said parish for one

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year then next ensuing, which persons, being parishioners and inhabitants of the said parish, so nominated, elected and chosen by the said select vestry, and none others, had, for and during all the time aforesaid, been duly sworn into, and served and executed, and by right and custom ought to have served, the office of churchwarden to the said parish. The declaration in that case further stated that the plaintiffs were duly elected churchwardens by the select vestry, and sworn into that office, and entitled to sit in a pew in the parish church, within the said parish, appropriated for the use of the churchwardens; nevertheless, the defendants had wrongfully drawn the plaintiffs into plea in the Spiritual Court, claiming a right to the pew as churchwardens of the said parish. The defendants pleaded the general issue, and for a writ of consultation said that the right of election was in the parishioners at large, and that defendants were elected by the parishioners at large, and were duly sworn in; concluding with a traverse of the custom set out in the declaration. This case had been tried at bar, when a verdict had been found for the plaintiffs. On the part of the defendant were put in letters-patent of 4 *Jac.* 1, in which it was recited that the parish church of St. Martin in the Fields had been erected, and the parish itself created, in the time of *Henry* the 8th. They also read other ancient entries from the parish books, from which it appeared that many acts of government in the parish were done by "the parishioners" generally, and sometimes by parties described merely as parishioners, many of whom were of the same name as the persons described in other entries as ancients of the parish, masters of the vestry, or masters of the parish. They also proved a faculty (a) from *Gilbert (Sheldon)*, Bishop of London, (28th June, 1662,) whereby he granted and confirmed to forty-nine persons that they should be a select vestry. The faculty then recited that several parishioners, of whom some

(a) As to the effect of which, see *Dawson v. Fowle*, 11 *Hardres*, 378; *Butterworth v. Walker*, 3 *Burr.* 1689.

had been vestrymen and others not, had petitioned the Bishop to grant and confirm to them a select vestry, such as existed in other parishes in his diocese, upon the ground that the affairs of the parish had, during the late unhappy times of trouble within this realm, been managed by persons not admitted thereunto by the Diocesan or Ordinary of the place, in whose power alone they conceived the regulation and ordering the business of that nature most properly and peculiarly ought to reside. The learned Judge said to the jury, that the four questions raised upon the record all resolved themselves into the first; that the verdicts in the three records produced deserved their most serious consideration, and were not lightly to be departed from. One of the points raised was, whether the parish had existed as a parish beyond the time of legal memory; and this seemed to be a matter of much doubt. On the behalf of the plaintiffs a great number of entries had been read, 13th Feb. 1776-77. The business transacted on these occasions appeared always to have been transacted by a very small number; never so large a number as forty-nine appeared to have assembled: the select vestry had not always consisted of forty-nine persons. But this point ought to have been put distinctly on the record (a). The acts of parliament which had been referred to, took it for granted that there was a select vestry. The term "ancients" imported a meeting of only a few. The faculty itself could not have the effect of excluding vestrymen. It was not material whether the Bishop granted or confirmed. If the select vestry took its origin from the faculty, it could not have existed from time immemorial. It was evident that in *Berry v. Banner* (b), some of the evidence which had now been given for the defendant was not adduced. The jury found a verdict for the plaintiffs.

In Trinity term, 1827, *Scarlett*, A. G., obtained a rule nisi for setting aside the verdict, on the ground that the custom put in issue on the record was void for uncertainty;

(a) Vide *ante*, 647, note (a).

(b) Peake, N. P. C. 157.



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for which *Dent v. Coates* (a), and *Broadbent v. Willis* (b), were cited; and, secondly, that the supposed custom had been abandoned by the acceptance of the faculty. Against this rule

*Tindul*, S. G., *Taunton*, *Gurney*, and *Barnewall*, now shewed cause. By the parish books produced, which went back as far as 1576, it appeared that the affairs of the parish were not managed in the ordinary course which prevails where there is an open vestry. Thus persons are stated to have been admitted to the office of vestrymen, and who at that remote period appear to have exercised the rights of vestrymen from the time of their admission. The Court would be justified in assuming that the same course of management prevailed at a much earlier period. So there is an entry (c), "to be fined according to ancient order." No entry of such an order is to be found in the present books; therefore the reference here must have been to others of a more ancient date. From these books it appears that the vestry were to meet in a room. Now it is clear that all the parish could not meet in a room. In 1620 there is an appointment of a vestry-clerk; since which period the form of the entries is very different. In 1662 a faculty was obtained for the purpose, as the plaintiffs contend, of confirming the select vestry, which already existed. The number never goes beyond forty-nine. The question has been raised several times before, and the Court and jury have decided in favour of the existence of a select vestry. The issue then tried comprised the case now before the Court, namely, whether the parish is governed by a select vestry or by a general vestry. *Ferrers v. Nind* (d) was tried only three years after the action for the false return (e). Any question as to the legal existence of the

(a) 2 Stra. 1145; where the words of the custom pleaded are, "a certain proportion of the rate has been used to be raised by the hamlet of Romanby," &c.

(b) Willes, 360; where the words are, "near to such pits," *post*, 656.

(c) *Ante*, 649.

(d) *Ante*, 649.

(e) *Kendul v. Penrice*, *ante*, 649.

select vestry in this parish, is now set at rest by 44 Geo. 3, c. 85 (a), which, though not cited at the trial, is a public act, of which the Court will take judicial notice. In this act we find a legislative recognition of this select vestry, who are authorized thereby to sue and be sued in the name of their clerk. It is not necessary in point of law that a select vestry should consist of a definite number; *certum est quod certum reddi potest*. This select vestry may be compared with the governing bodies of the Inns of Court: the latter are called "masters of the bench;" the former, "masters of the parish." (b). With regard to the objection that there is no definite number, it may be observed that it is not unfrequent in common councils that a mayor shall fall back into the number of common council: whilst these mayors continue alive, the number must fluctuate. This is the case with the corporation of York. [Bayley, J. There the mayor must be chosen out of the aldermen.] It is also the case in the corporation of Monmouth. All that is necessary is, that there should be a *reasonable* number. If the number were very small, that might be unreasonable; but a number varying from forty-nine to sixty-two, is not unreasonably small. It is more reasonable that the number should fluctuate, owing to the exigencies of the parish. The custom of *Tanistry* (c), and the custom pleaded in *Wilks v. Broadbent* (d), and *Dent v. Coates* (e), may be admitted to be void for uncertainty, without affecting the present question. There was quite sufficient for the jury to infer that the same number which had existed since 1662 did exist before. The entries in the books shew that the numbers could not have exceeded forty-nine. The supposed necessity for there being a stated number is a mere *gratis dictum*. The faculty was evidently intended to operate merely as a confirmation. In corporations it is very common to accept a new charter, varying in some respects the rights of the body; and if the new charter turns out to

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(a) Public and local act.

(b) *Ante*, 650.

(c) Davis, 34.

(d) Willes, 360; *ante*, 652 (b).

(e) 2 Stra. 1145; *ante*, 652 (a).

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be invalid, the parties are remitted to their former position, as an old lease is held to have continuance notwithstanding the acceptance of a new lease, which turns out to be void (a). The acceptance of a charter does not destroy a previous immemorial custom. It is not ~~unusual~~ in corporations to have a definite number, with a further indefinite number. If it were necessary to shew a fixed number, that is sufficiently shewn here. Every reasonable presumption will be made in favour of a usage which is shewn to have existed for 300 years, and the case of Corporations (b), where that doctrine is laid down, very much resembles the present case. The Court will, if necessary, presume an act of parliament: *Fanar's case* (c), *Mayor of Hull v. Horner* (d), *Pickering v. Lord Stamford* (e), *Chalmer v. Bradley* (f). If it were necessary that the select vestry should consist of a definite number, there is abundant evidence of the existence of such definite number. The defendant must be allowed to have shewn an unaccountable perseverance in continuing to resist the rights of the select vestry, after it has been established by three concurring verdicts (g) within the last 100 years.

*Scarlett, A. G., Brougham and Joshua Evans, contra.* The voluntary associations which have been mentioned are very different from the case of a select vestry; nor can any assistance be derived from the power of presuming an act of parliament, since the right here is claimed by way of custom, and not by a parliamentary enactment. The acts

(a) 6 East, 86. And see 2 Smith, 166, S. C.

(b) 4 Co. Rep. 77, b.

(c) Skinner, 78, cited.

(d) Cowp. 102.

(e) 2 Ves. jun. 273. 282.

(f) 1 J. & W. 51.

(g) As the issues were there taken upon the existence of a select body, consisting of a definite number, it would seem that the

jury in *Ferrers v. Nind* would have found a verdict negating the custom as there pleaded, if the facts which were given in evidence in the principal case had appeared upon that trial. In *Berry v. Banner*, Lord Kenyon told the jury that unless they were satisfied that the select vestry consisted of a certain unvarying number, they must find a verdict for the defendant.

of parliament which have been referred to merely shew the existence of a select body. There could be no objection on the ground of the variation in the number, if all were elected by the parishioners: there may be a custom for the parishioners to elect a vestry annually, and of an indefinite number. It is clear, from the order of 1606, that the whole number of the vestry was then twenty. The setting up a right in a select vestry of an indefinite number, was an after-thought, though the word "certain" is now struck out of the record (a). The custom, taken altogether upon the evidence, is unreasonable. There is no power to prevent the select body from suffering their number to be reduced to two or to one; and this is a body claiming a right to elect their own members, and to tax the parish. [Lord *Tenterden*, C. J. What rates have the select vestry a power to make? The churchwardens must join them in making a rate.] The select vestry may make a church-rate. The case of the *Archbishop of York's* lease (b) was that of a mere private right. [Holroyd, J. In that case there was an actual surrender.] Custom depends upon usage; if the custom be gone, the right arising from it is gone also; it cannot be abandoned and resumed at pleasure; there must be a continuous exercise of it. It was shewn that in the time of *Charles 2.* the custom had no existence. The word "confirmed," which occurs in the faculty, is relied on by the other side; but it is evident that the "confirmation" applies only to the grant, and not to a pre-existing usage. The report in *Peake* is very jejune and narrow, and the question raised here never arose in that case. It is said that if it is not a good custom without a definite number, the Court can here see that the select vestry did consist of a definite number; but the Court will not take the place of the jury. The custom laid is too uncertain. *Fitch v. Rawling* (c), *Selby v. Robinson* (d). It was a question of

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(a) *Ante*, 647.(b) *Ante*, 654 (a).

(c) 2 T. R. 758.

(d) 2 H. Black. 394.

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law whether such a custom can be supported. No minimum and no maximum in the numbers of the select body were proved. In a corporation there cannot be a select body by the election of as many as the electors please, who might elect the whole corporation. *Dent v. Coates* (a) is a very strong case, to which no answer has been given. The case of *Corporations* (b) has been cited. That shews that where a corporation have accepted a charter, and have acted upon it, they are bound by it. [Lord *Tenterden*, C. J. The plaintiff's argument was, that a *definite* number, electing each other, might be good, but that an *indefinite* number could not so elect.] In *Berry v. Banner* (c), Lord *Kenyon* laid great stress on the confirmation. The verdict then found that forty-nine was the number. There are entries to shew that sometimes the churchwardens were not of the vestry. [Lord *Tenterden*, C. J. That is after they were out of office.] What the defendant relies on is, that when out of office they were sometimes members of the select vestry, sometimes not. Is it reasonable that the persons having the sole control, and accounting only to themselves, should have the power to appoint their own number? The case in *Skinner* (d) was a case of private property. An act of parliament for this purpose cannot be presumed. There was an abandonment of the custom in 1662. The custom was to elect. According to the Solicitor-General, the Bishop of London lent himself to a disgraceful trick, in order to purge the vestry, knowing that he had no authority (e). There was no evidence to shew the number below which they could not go: quite uncertain both as to how few, or how many. In *Broadbent v. Wilks* (f) a custom to lay coals, &c. from the coal pits, on customary lands (g) near to such pits, without saying for how long, and to take away part of the coals without saying

(a) 2 Stra. 1145; *ante*, 652 (a).

(b) 4 Co. Rep. 77 b; *ante*, 654.

(c) Peake, N. P. C. 157; *ante*, 651, 654 (g).

(d) *Farrar's case*, *ante*, 654, n.

(e) *Ante*, 654.

(f) Willes, 361; *ante*, 652 (b).

(g) As to the distinctions between the several species of customary lands in the north of England, *vide Lady le Fleming v. Simpson*, *ante*, 269, note (c).

how much, and to burn the other part into cinders there, was held to be bad for uncertainty. There the Lord Chief Justice says, "Every custom must be certain, for two plain reasons; first, because if it be not certain, it cannot be proved to be time out of mind; for how can anything be said to have been time out of mind when it is not certain what it is? secondly, it must be certain, because every custom pre-supposes a grant; and if a grant be not certain, it is void." If the number is certain, they are compellable to fill up their number. There is no instance in the books not alleging a certain number. The next question is, whether the custom is reasonable. They are bound to account only to each other, and have a right to make what rates they please, as church rates. [*Bayley, J.* That is under the control of the Ecclesiastical Court.] The answer given in the Spiritual Court was, we will only account to ourselves. The churchwardens are members of the body to which they are to account.

*Cur. adv. vult.*

Judgment was now delivered by.

LORD TENTERDEN, C. J.—This case came before us on a motion for a new trial of certain issues directed by the Court. The principal issue, the others being in fact dependent upon this, was, whether, in the parish of St. Martin in the Fields, there has been from time immemorial a vestry composed of select persons, parishioners and inhabitants of that parish for the time being, or not. The cause was tried before me and a special jury, who found that issue in the affirmative. Considering this as a question whether this parish has had a select vestry, or whether the inhabitants generally have met in vestry, this is the third time that the fact of the select vestry has been found. The first was on an issue directed by this Court in the 18th Geo. 2, at a trial at the bar of the Court, and it was consequent upon the trial of an action for a false return to a mandamus, in which, according to all probability, the same question had been tried, and the same verdict found,

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although the form of the record is not such as to shew it was disputed. The second was in the year 1792, in a proceeding in prohibition, in which questions of law might have been raised, and put on the record, and carried to the highest tribunal in the land. There are also acts of parliament relating to this parish, referring matters to the authority of the select vestry, and, consequently, recognizing the existence of such vestry; and there was an act passed in the reign of *Queen Anne*, relating to new churches built at that time, pointing to this vestry in the parish of *St. Martin's*, as it then existed, as a model for such parishes as had not then select vestries. It was said, however, and said truly, that the select vestry of this parish, as it existed at the date of that act of parliament, was not precisely that vestry which does exist, according to the custom found, at the present time. A similar remark was made as to the two former trials; whether accurately, as applicable to the first of them, may be doubtful: as applicable to the opinion of *Lord Kenyon*, given in 1798, at the trial of the issue then presented to him, and to the evidence and verdict, as conformable to that opinion, the remark is undoubtedly just. At that trial the form of the issue treated the question as one respecting a vestry composed of some definite number of persons, whereas the present record raises no such question, and the jury were so informed by me at the trial; the verdict, therefore, must be considered as establishing a select vestry not necessarily composed of any definite number of persons: and this has given rise to the objections on which the motion for a new trial was founded. The objections were two. First, that a custom for a select vestry, consisting of an indefinite number of persons, continued by the election of new members made by itself, and not by the parish at large, was void in law: and secondly, that the custom in this parish appeared by the evidence to have been discontinued and abandoned, and therefore was lost and gone. It is obvious that the first objection does not properly belong to a motion for a new trial; but as the issue in this case was directed by the Court, with a view

to a proceeding pending in the Court, it properly belongs to that view of the case, and therefore the manner of bringing it forward and discussing it is not material. In support of the first objection it was very strenuously argued, that unless a number be fixed by the custom, at least so that it may be known that below that number a vestry cannot be formed, a vestry filling up its members by its own choice may be allowed to reduce itself to two or three only, exclusive of the vicar and the churchwardens, and that thereby the whole government of the parish, as far as relates to the church and the arrangement of the churchwardens' accounts, and other matters of that kind, may fall into the hands of a number of persons too small to secure a reasonable and proper management, and due attention to the interests of the inhabitants of the parish at large. It was also objected, that if the number be not limited, the vestry may consist of too many, even of the whole parish. This point, however, was little urged. There is obviously no weight in it. The great complaint against select vestries is, that they consist, not of too many persons, but of too few; and if a maximum had been fixed by the custom in the very remote times to which the custom must go back, the number that might have been proper in those times, might, and probably would, be too small for the great increase of population which has gradually taken place in this parish. We are also of opinion that a custom of this kind is not void in law for want of a minimum; but although we are of this opinion as a matter of law, I would by no means have it understood that we think the evidence or the verdict in the present cause establishes the fact that there may not be a minimum in this parish. It would be quite consistent with the verdict, and not inconsistent with the evidence, that the number should never be less than the lowest that can be found in any of the instances, and there will in no instance, I believe, be found to be so few as twelve. The form of the issue raised no question of this kind. Now, although no numerical minimum be fixed

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by the custom, it by no means follows as a consequence, that the number may be reduced to two or three, as the objection supposes. The law may well consider it as part of such a custom as the present, that there shall be a reasonable number. I am aware that this may lead to the question, what shall be a reasonable number. Such a question, if raised, would be to be discussed with reference to long-established usage, and to the population of the parish. That number which might be not too small, and not unreasonable, three or four centuries ago, in a parish in which there might not be more than a dozen substantial householders, or even so many, might be unreasonable on a change of circumstances, and where, by covering fields with houses, the parish would be greatly increased. Whatever may be thought of the degree of influence that the love of power exercises over the human heart, I believe the love of ease does not exercise less. There is no instance known in practice in which two or three persons have taken on themselves, gratuitously, the whole burthen of administering the affairs of the population of a parish belonging to themselves; and we do not think, in theory, that there is any reason to require a definite minimum, as essential to the validity of the custom. The question in this case, as in many others, turns upon the balance of convenience. We think it more convenient that the custom should leave the number of the vestry indefinite, to be regulated and varied by the changes time may make, than that there should be any fixed point above or below which no change of circumstances can allow an alteration. We, therefore, think the custom good in law. The second objection, namely, that the custom in this parish appeared by the evidence to be disclaimed, abandoned, and therefore lost, raises a question proper to be submitted to us upon a motion for a new trial. It appears by the evidence, that in the year 1662 a faculty was obtained from the Bishop of London, naming 49 persons, together with the vicar and churchwardens, as the select vestry, and appointing that

number to be kept up by an election to be made by a certain number, by ten at least, with the vicar and churchwardens. In 1673, that number, by another faculty, was reduced to 7. These faculties have since been constantly acted on, and have been considered as governing the parish, and treated as the legal foundation of the practice ever since. It is clear, however, that these faculties have no validity in law. As to the constitution of the first vestry thereby appointed, it appears that 10 out of 14 vestrymen, exclusive of the vicar and churchwardens, who were present at the vestry holden immediately before the promulgation of the first faculty, were part of the 49 named in that faculty. Now, if the vestry, as appointed by the faculty, and as it has since continued, was inconsistent with the vestry previously existing by the custom, there would be more weight in this objection than at present can be given to it. But it is not inconsistent with a custom fixing no definite number, that at a certain period the vestry should have been considered as consisting of a definite number. If there be any reasonable number, 49 may be thought to be that number, and may be considered as the proper number. Suppose a vestry, consisting of 12 or 14, should come to a resolution to increase the number to 49, and should do so, and should recommend that number to be kept up in future, and that this should be followed in practice for a century and a half, nothing inconsistent with the antecedent usage could detract from that. The resolution would have no binding force. It might be departed from, and a greater or less number chosen, if the existing body should think fit: and the case would be the same even if it should appear that, during that time, the vestry and the parishioners had thought the resolution binding on the parish, and had acted under that notion. Now, this is precisely the case with respect to the faculties, and the opinion of the usage that has since prevailed. I have already observed, that the members of the old vestry became members of the new; therefore the old vestry, or

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a majority thereof, may be considered as having existed : it being as competent to the vestry to increase or decrease their number, as if no faculty had existed. As the practice, therefore, is not inconsistent with the custom, we are of opinion that the custom has not been destroyed, but still remains as law ; and the rule for a new trial must consequently be discharged.

Rule discharged.

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### RULE OF COURT.

*Hilary Term, 8 & 9 Geo. 4.*

“ Whereas great expense is often unnecessarily incurred in making up demurrer books, from setting forth those parts of the pleadings to which the demurrers do not apply :—IT IS THEREFORE ORDERED, that from and after the end of this term, when there shall be a demurrer to part only of the declaration or other subsequent pleadings, those parts only of the declaration and pleadings to which such demurrer relates shall be copied into the demurrer books ; and if any other parts shall be copied, the master shall not allow the costs thereof on taxation, either as between party and party, or as between attorney and client.”

BY THE COURT.

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The KING v. The Inhabitants of ALL SAINTS,  
SOUTHAMPTON (a).

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BY an order, bearing date the 7th December, 1826, made by *George Eyre* and *Wm. Sloane Stanley*, Esqrs. two of the justices of the peace for the county of Hants, *Elizabeth Carden* was removed from the parish of *Romsey Extra*, in the said county of Hants, to the parish of *All Saints*, in the town and county of the town of *Southampton*; and on the hearing of an appeal against the same at the last Epiphany Sessions for the said county of Hants, the Court confirmed the said order, subject to the opinion of this Court on the following case:—

The examination of a soldier under the Mutiny Act as to his settlement, is not admissible in evidence unless it appear that the examinant was quartered in a district in which the examining magistrates have jurisdiction.

The said *Elizabeth Carden* was the widow of one *Richard Roe Carden*, deceased; and in order to prove the settlement of the said *Richard Roe Carden*, the respondent parish produced in evidence, and duly proved the paper writing following:—

“Town of *Romsey Infra*, } “The examination of *Richard*  
in the county of South- } *Roe Carden*, a private soldier  
ampton. } in his majesty’s 25th regiment  
of foot, taken on oath before us, two of his majesty’s justices of the peace for the said town, the 6th day of April, 1782, touching the place of his last legal settlement, the said examinant on his oath saith, that he was born in the parish of *Romsey Infra*, in the town of *Romsey Infra* aforesaid, as he hath heard and verily believes, where his father was a settled parishioner; that about fifteen years ago last harvest, he hired himself as a covenant servant, for a year, to *David Pallant*, of the parish of *All Saints*, in the town and county of *Southampton*, Esq. at the wages of four pounds, and in consequence thereof he entered into the service of the said *David Pallant*, and served him there till about Christmas following, when this examinant went with

(a) This and the following cases were argued before *Bayley*, *Holroyd*, and *Littledale*, Js., after the

term, by virtue of the King’s warrant, issued under 3 Geo. 4, cap. 102.

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his master and his family to London, where he stayed with him about three months, when he returned with his said master to the said parish of All Saints, and continued in his said master's service there during the remainder of the said year, and at the expiration thereof he received his full year's wages, and that he hath never done any act since, to his knowledge, whereby to gain a settlement; and that he hath a wife, named *Elizabeth*, and one child, named *Moses*, aged two years and upwards.

(Signed) *Richard Roe Carden.*

Sworn the day and year above mentioned, before us,

(Signed) *Wm. Biggs*, Mayor.

*Thos. Dawkins.*"

The appellant parish objected to the Court's receiving this, inasmuch as it did not appear on the face of it that at the time the examination was taken the soldier was quartered in the town of Romsey Infra, and therefore was not a due examination within the provision and meaning of the Mutiny Act. The Court, however, found the paper to be a due examination under the Mutiny Act, and thereupon confirmed the order. The question for the opinion of the Court is, whether such paper writing was a due examination within the provisions of the Mutiny Act or not. If it was, then the original order and order of sessions to stand, but if not, then the said orders to be quashed.

*Dampier*, in support of the order of sessions. By the Mutiny Act (a) two justices are authorized to take the examination of a soldier who has a wife and child. It appears, upon the face of this instrument, that the examinant was a soldier having a wife and child. At this distance of time no parol evidence could be expected; but it must be presumed that the magistrates acted regularly, and therefore that the pauper's husband was quartered within the jurisdiction of the magistrates by whom the examination purports to have been taken. The case of *The King v. Aus-*

(a) 22 Geo. 3, cap. 4.

*trey* (a) will probably be relied upon by the other side; but what is there said with reference to the necessity of shewing the jurisdiction of the magistrates must be understood with reference to the case then before the Court, which was that of a certificate required to be in a particular form by the express words of an act of parliament (b). This examination is not to be construed with the same strictness as a conviction.

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. *Carter and Poulter*, contra. The document in question was offered in evidence as an examination under the Mutiny Act. If admissible, it would at once decide the appeal. The object of the statute was, that something might be substituted for the personal attendance of the soldier. In *The King v. Clayton Le Moors* (c) this very objection was taken by *Heywood*, Serjt., though nothing was decided upon the point. Lord *Kenyon* there says, "This clause in the Mutiny Act is of modern introduction, and before that time there is no pretence to say that such an examination as the one in question could be received in evidence. It is admitted that it is contrary to the common rules of evidence. Whether it were or were not wise to introduce such a clause in the Mutiny Acts, which was not formerly contained in those statutes, it is unnecessary to inquire; but the question here is, whether this act of parliament, which makes an innovation on the law of evidence, should be carried beyond the express words of it. In my opinion it ought to be construed strictly." An examination under this statute can scarcely ever take place except at the instance of the interested parish. It is in fact evidence brought forward by a party interested against a party who has had no opportunity of cross-examining. In the case referred to, *Ashhurst*, J. thought that every thing necessary to give the jurisdiction should appear on the face of the examination. In *The King v. Warley* (d) the point was attempted to be raised, but was excluded by the form of

(a) 1 Phill. Evidence, 4th ed. 469. (c) 5 T. R. 706.

(b) 8 & 9 Will. 3, cap. 30.

(d) 6 T. R. 534.

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the case. In *The King v. Bilton* (a), it was held that the examination must be authenticated, and does not prove itself, *though in the form prescribed by the act*. This is not an instrument which time can cure; it may be put away in the parish repository, and not appear again for years. In the execution of powers all circumstances must be strictly complied with. *The King v. Austrey* (b). The power given to these magistrates ought to have been strictly pursued; it was a ministerial act. [Bayley, J. If ministerial, the magistrates might do it separately.] It ought to appear on the face of the instrument that they were acting pursuant to the statute: it was a special and limited authority. It does not appear that the magistrates had any jurisdiction over the place in which the soldier was quartered; nor does it appear that the examination took place within the jurisdiction. If the party could be summoned ten miles from the place where he was quartered, the inconvenience would be greater than that intended to be remedied by the statute; the party may be summoned a second time under the 34th section. In *The King v. Chilverscoton* (c) this Court held that an order of removal, on the face of which it does not distinctly appear that the magistrate had jurisdiction, is an absolute nullity. In *The King v. Hall* (d) the conviction of a party, as a rogue and vagabond, under 17 Geo. 2, c. 5, s. 1, for deserting his family, was held bad, for not shewing that the family was chargeable to the parish. So a conviction under 23 Geo. 3, c. 88, for not alleging that the party had implements of housebreaking upon him at the time of his apprehension. *The King v. Brown* (e). [Bayley, J. It is conceded that upon a conviction you must shew jurisdiction, also upon orders.] In the case of all inferior jurisdictions, the authority must appear upon the face of the instrument. *The King v. Bagshaw* (f), *The King v. Liverpool* (g), *The King v. Bawburgh* (h).

(a) 1 East, 19.

(f) 7 T. R. 363.

(b) 1 Phill. Evid. 4th ed. 469.

(g) 4 Burr. 2224.

(c) 8 T. R. 178.

(h) 3 D. &amp; R. 338, 2 B. &amp; C.

(d) 3 Burr. 1636.

222, 2 D. &amp; R. M. C. 23.

(e) 8 T. R. 27.

BAYLEY, J.—In this case I think there is not enough to make the examination evidence. The Mutiny Act gives a special power in certain cases; but for the statute this examination would be extra-judicial. By that statute (a), if any non-commissioned officer or soldier shall have wife, child, or children, two justices may summon him where he is quartered, to make oath of the place of his last legal settlement, who shall obey such summons, and make oath accordingly: and the justice shall give an attested copy of such affidavit, to be delivered to the commanding officer, to be produced when required, which attested copy shall be at any time admitted in evidence as to such settlement before any justices or at any sessions; and if he be summoned again to make such oath as aforesaid, then, on such attested copy of the oath by him formerly taken being produced, he shall not be obliged to take any other or further oath, with regard to his settlement, but shall leave a copy of such attested copy of examination if required. The justices, therefore, have no jurisdiction, except in the case of a soldier, nor unless the soldier is quartered within their jurisdiction. In the Banbury peerage case, it was resolved, in 1809, by the judges, on a question put to them by the House of Lords, that a bill in equity or depositions cannot be received in evidence against a party not claiming under the plaintiff or defendant in the chancery suit. Here the facts constituting the jurisdiction, namely, that the examinant is a soldier, and quartered within the jurisdiction, must be shewn, either *aliunde* or *ex visceribus*. I think it should have been made out *aliunde*. In *The King v. Warminster* (b) it was proved *aliunde* that the party was a soldier, and quartered within the jurisdiction. Here it merely appears upon the face of the examination, and you would make the examination proof of facts giving the jurisdiction. But even these facts are not

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(a) 22 Geo. 3, c. 4. And see 5 Geo. 4, c. 13, s. 72, by which the power of examination is given to one justice, and both the examina-

tion and the attested copy are directed to be admitted in evidence.

(b) 3 B. & A. 121.



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represented to have been stated on oath; they are merely introduced as part of the description of the examinant. We are asked to supply by construction and intendment that which must, at least, have been proved before the justices. In the case of *The Queen v. Gouche* (a) the Court said that they would presume jurisdiction; but that decision was overruled in *The King v. Halling* (b), and *The King v. Hulcott* (c), in the last of which cases Lord Kenyon, upon full consideration, says, "As it does not appear on the face of this order that the justice had jurisdiction, the pauper was not legally discharged from her service. There is no material distinction in principle between this case and cases of orders. If it were sufficient to state the jurisdiction upon the face of an order, there would be no difficulty here. If that be not sufficient, there must be proof *aliundè* to make the examination evidence." Here the facts necessary to give the jurisdiction are not all stated upon the face of the instrument, nor are they proved *aliundè*.

HOLROYD, J.—The authority given by the Mutiny Act is only to magistrates who have jurisdiction within the district. The distinction between courts of special and general jurisdiction is laid down in *Miller v. Seare* (d); and though that case is overruled (e) as to the point there decided, that an action would lie against commissioners of bankrupt for a wrongful commitment, that distinction is well established. The rule *omnia præsumuntur ritè esse acta* does not apply to the facts which constitute the jurisdiction. In a plea of justification all the facts which shew the jurisdiction must be stated, and they must also be proved. Here those facts neither appear on the face of the document nor are shewn *aliundè*. It is, therefore, not necessary to decide whether it would have been sufficient if the facts

(a) 2 Salk. 441; 2 Lord Raym.
 840.

(b) 1 Stra. 8.

(c) 6 T. R. 583.

(d) 2 W. Bla. 1141. 5.

(e) In *Doswell v. Impey*, 2 D. &
 R. 350; 1 B. & C. 163.

had appeared on the face of the document. The case referred to, with regard to wages in husbandry (a), is directly in point.

Order of Sessions quashed.

(a) *Rex v. Hulcott, ante, 668.*

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MARSDEN and another v. STANSFIELD.

THIS was an issue directed by this Court, for the purpose of trying "whether a certain messuage or tenement, with the lands and appurtenants thereunto belonging, commonly called or known by the name of Hill Barn, in the occupation of the said defendant, or any part thereof, is situate within the chapelry of Littleborough, in the county palatine of Lancaster, and the bounds and limits thereof;" the said plaintiffs thereupon maintaining the affirmative, and the said defendants the negative. This issue came on to be tried before Mr. Baron *Hullock*, at the summer assizes for the county of Lancaster, 1826 (a), and upon that trial one *James Cryer*, then occupying rateable property in the said chapelry of Littleborough, was called as a witness on behalf of the plaintiffs, and upon objection made as to his competency by the defendant's counsel, was admitted. This Court was therefore moved, in the following Michaelmas term, for a new trial, upon the ground of the reception of such witness being improper, and was pleased to direct that a special case should be stated raising the question of the admissibility of the above witness. The questions for the opinion of the Court are,

Upon an issue whether tenement *A.* is situate within the chapelry of *B.*, a witness occupying rateable property in *B.* is competent to prove the affirmative.

1st, Whether the said *James Cryer* be a competent witness on the said issue under the above circumstances.

2dly, If he be incompetent at common law, whether such

(a) Counsel for the plaintiffs, *Cross*, Serjt., and *Courtney*; for the defendant, *Scarlett* and *J. Williams*.

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incompetency be not remedied by 54 Geo. 3, c. 170, s. 9 (a).

Courtney, for the plaintiffs. No question of competency is raised by the special case. *Non constat* that the estate creates any liability. It should have been shewn that all tenants within the chapelry paid rates. The Court cannot go out of the case without exceeding its jurisdiction; for whether this estate is rateable or not, is matter of ecclesiastical cognizance. No advantage is intended to be taken of any impropriety in the mode of statement, but the defendant had no better case to state. The allegation is not that the witness was rated, but that he was the occupier of rateable property. In *Rex v. Kirdford* (b) it was held, that mere liability to be rated was no objection to the witness's competency. So in an action before Mr. Baron *Burland*, at Salisbury, on a penal statute, where the penalty was given to the parish (c). *Rhodes v. Ainsworth* (d) will be relied on by the defendant; but that case is distinguishable from the present in three points. There the witness was the owner of the inheritance, and had therefore a permanent interest

(a) Which enacts, "that no inhabitant or person rated, or liable to be rated, to any rates or cesses of any district, parish, township, or hamlet, or wholly or in part maintained or supported thereby, or executing or holding any office thereof or therein, shall, before any court or person or persons whatsoever, be deemed and taken to be, by reason thereof, an incompetent witness for or against such district, parish, township, or hamlet, in any matter relating to such rates or cesses; or to the boundary between such district, parish, township, or hamlet, and any adjoining district, parish, township, or hamlet; or to any order of removal to

or from such district, parish, township, or hamlet; or the settlement of any pauper in such district, parish, township, or hamlet; or touching any bastards chargeable, or likely to become chargeable, to such district, parish, township or hamlet; or the recovery of any sum or sums for the charges or maintenance of such bastards; or the election or appointment of any officer or officers; or the allowance of the accounts of any officer or officers of any such district, parish, township or hamlet."

(b) 2 East, 559.

(c) Cited by *Buller*, J. in *Rex v. Prosser*, 4 T. R. 20.

(d) 1 B. & A. 87.

in the estate, upon which the burthen was to be fixed; the rate was actually imposed; and thirdly, the issue there was, whether the inhabitants had from time immemorial repaired the chapel. [*Bayley, J.* Here it does not appear that the witness was an occupier of property liable to any chapelry rate.] The case of *Deacon v. Cook (a)*, is a strong authority for the plaintiffs. There Mr. Justice *Buller*, in a question upon the boundaries of two adjoining parishes, held that a parishioner *actually rated* was not a competent witness to extend the boundaries of his parish, but he admitted such as were only *liable to be rated*. If any doubt could be entertained as to the competency of this witness as at common law, that doubt is removed by 54 Geo. 3, c. 70, s. 9, to which, in *Rhodes v. Ainsworth*, the attention of the Court does not appear to have been called; but in *Meredith v. Gilpin (b)*, rated inhabitants were held to be qualified by this statute to be witnesses on a question where the lands were held in trust for the parish in the aid of the poor rates.

Alderson, contra. The Court will understand the allegation of the witness's being rateable, as meaning that he is liable to that which in a parish would be a church rate. In *Rex v. Kirdford*, the only matter in question was the validity of one particular rate in which the witness was not included. In Lord *Clanrickarde v. Lady Denton (c)*, the issue was upon a custom for all overseers and proprietors of any coppices or woods, within the Weald of Kent, to be discharged of tithes for all manner of wood; and to prove the custom, the testimony of all those who were entitled, either as owners or farmers, to any wood within the Weald of Kent, was rejected. The statute applies only to existing rates, and here the question is not between the district on one side and the parish on the other. If the construction of

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(a) 2 East, 562, cited.

(b) 6 Price, 146.

(c) B. R. Mich. 17 Jac. 1; 1

Gwill. 360, 1 Eagle & You, 306;*S. C.* not *S. P.* 2 Roll. Rep. 122,*Palm.* 37.

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the act contended for were to prevail, or if this were to be considered as a case within the statute, this absurdity might follow, that a party who had a term of 999 years would be qualified by the statute, while the reversioner in respect of his minute interests would remain incompetent.

BAYLEY, J.—It lay upon the defendant to shew that the witness was incompetent. The Court has no means of knowing whether this was a burthen or a benefit to the witness. Before we can exclude a witness on the ground of interest, we must see that it exists. The right of sitting and of sepulture in the chapel, and the exemptions from burthen in the mother church, may outweigh the disadvantages of any liability to rates within the chapelry. *Deacon v. Cook* and *Rex v. Kirdford* have established the principle, that a party rateable, but not rated, is not disqualified from being a witness. It is also a plain case upon two branches of the 54 Geo. 3, c. 170. That statute expressly provides for cases relating to rates and cesses. Another branch of the statute provides for cases relating to boundary: now the boundary of the parish may not be one continuous line. It raises the question what is parochial land and what not. Although it be insulated, you are still entering into a case of boundary; a piece insulated makes an additional boundary line. The witness is therefore not excluded at common law, and if he were, the construction of the statute is in favour of his admissibility.

HOLROYD, J.—I concur upon all three points. *Rex v. Kirdford* shews that the witness was competent at common law; and then, under the statute, this case relates to rates and cesses; for if it does not, the objection to the competency of this witness could not arise. I think also the case is within the second branch of the statute, as relating to the boundary of the district.

LITLEDALE, J.—I am of the same opinion. I think

there was no objection to the witness on the score of interest at common law; but if he would have been inadmissible before, he is rendered competent by the statute. This is a question relating to boundary. I am not prepared to give an opinion upon the other point, arising out of the statute, namely, as to the clause relating to rates and cesses. Soon after the passing of the acts, several cases arose, in which different opinions were entertained upon that point.

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Rule for new trial discharged.

HOLDSWORTH and another v. WISE and others.

ASSUMPSIT, to recover the sum of 1,800*l.* for the alleged total loss of the brig *Westbury*, under a policy of insurance effected by plaintiffs, and signed by defendants, on a voyage "at and from Belfast, to her port or ports of loading in British America, (the river St. Lawrence excepted,) during her stay there, and back to a port of discharge in the united kingdoms, between Falmouth and Greenock, on the west side of England and Scotland, or any safe port in Ireland; to call at Cork for any orders." The brig was valued in the policy at 1800*l.* The perils insured against were "of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of marque and countermarque, surprisals, taking at sea, arrests, restraints and detainments of all kings, princes and people, of what nation, condition or quality soever; barratry of the master and mariners, and all other perils, losses and misfortunes, that had or should come to the hurt, detriment or damage of the said ship, and the materials thereof; (offences against the revenue of Great Britain excepted.)" The declaration stated, that plaintiffs were interested in the ship to the amount of 1800*l.*; that

A ship deserted at sea by her crew, under a *bond fide* belief that she is sinking, is totally lost. The right of the assured to recover as for a total loss, is not affected by her being afterwards restored at an expense equal to her value; nor is deserting the ship, under the circumstances, negligence in the crew. See *post*, 683 (a).

The implied warranty of sea-worthiness in a policy on a ship, does not extend to her being seaworthy at every port which she leaves in the course of her voyage.

port which she leaves in the course

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she sailed from Belfast upon the voyage insured; and, before its completion, was, *by the perils and dangers of the sea, and by stormy and tempestuous weather, and by the violence of the winds and waves, wholly lost.* Plea, non-assumpsit, and issue thereon. At the trial before *Hullock, B.*, at the last assizes for Lancaster (a), the following were, in substance, the facts of the case:—The ship sailed from St. Andrew, in New Brunswick, with a cargo of timber, on the 16th of September, 1826, bound for Valentia, in Ireland. She had fair weather until the 20th, on the evening of which day a gale came on, which prevailed until the 23d. On the 22d there was a very heavy sea, and the ship laboured very much, and was laid on her beam ends. The pumps were kept constantly going, and the timber on the deck was thrown overboard. A sea struck the jolly-boat, and carried it away. The ship remained on her beam ends until the afternoon of the 23d, when she was got before the wind, but would not answer the helm. The pumps were then choked, and the ship appeared to be sinking. The top-gallant masts were cut away, but that did not relieve her, and the crew, believing their lives to be in immediate danger, insisted on leaving the ship. They accordingly got into the long-boat, and were soon afterwards picked up by a foreign vessel, the *Colombia*, then in sight, and landed at Boston in America. The ship was leaky when she sailed from New Brunswick, and at that time made from eleven to twelve inches water every two hours. The ship was afterwards taken in tow by another vessel, the *Bolivar*, and carried into New York. She was there repaired, and sent from thence to Liverpool, where she arrived with heavy charges upon her for salvage and repairs, having met with another accident on her voyage from New York to Liverpool. She arrived at Liverpool under bottomry, with a charge of 1200*l.*; and the subsequent charges upon her amounted to 800*l.* more. In a few days after the plaintiffs

(a) Counsel for the plaintiffs, *F. Pollock and Parke*; for the defendants, *Brougham and Starkie*.

knew of her arrival, they gave notice of abandonment. Four points were made for the defendants:—First, that the crew had been guilty of misconduct in abandoning the ship without sufficient cause, as appeared by the fact of her having been afterwards taken in tow by another vessel, and carried into New York. Second, that the policy included an implied warranty of sea-worthiness in the ship and good seamanship in the crew, at every port from which she sailed in the course of the voyage; and that as she was making from eleven to twelve inches water every two hours when she sailed from New Brunswick, she was not then sea-worthy, nor did the master exercise good seamanship in sailing on such a voyage with a ship in such a condition. Third, that the plaintiffs had not given notice of abandonment within a reasonable time. And, fourth, that as the ship ultimately arrived at Liverpool, in esse, the plaintiffs could not recover for a total loss, but at most for an average loss only. The jury found in favour of the plaintiffs upon the first and third objections. The other objections were reserved by the learned Judge, and, subject to them, a verdict was found for the plaintiffs, the amount of damages to be settled out of Court. A rule nisi having been obtained for setting aside the verdict, and entering a nonsuit,

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F. Pollock and Parke shewed cause. There are two questions in this case. The first is, whether the injury done to the vessel, which occasioned her leaking, assuming it to have been occasioned by the negligence of the master and mariners, had the effect of vitiating the policy between the assured and the underwriters. That question seems to have been set at rest by the decision of this Court in the very recent case of *Bishop v. Pentland* (a): for the Court there, acting upon the two cases of *Bush v. The Royal Exchange Assurance* (b), and *Walker v. Maitland* (c), laid it down as a rule of law, that the negligence or mismanagement of the

(a) Ante, 49. 7 B. & C. 219.

(c) 5 B. & A. 171.

(b) 2 B. & A. 73.

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master or mariners does not discharge the underwriters, where the loss is occasioned by one of the perils against which they have insured. The second question is, what effect is produced upon the policy by the facts of the ship being deserted at sea, from the perils of the sea, being afterwards restored, with a charge upon her, and then being finally abandoned; whether those circumstances entitle the assured to recover against the underwriters for a total or only for an average loss. The plaintiffs in this case claim to recover as for a total loss. If the defendants intended to resist that claim they ought at least to have tendered to the plaintiffs the amount of the average loss, paid off the bottomry charge, and desired them to take possession of the vessel. Undoubtedly, the mere act of abandonment by the assured will not convert into a total that which is in reality only an average loss; but where the loss is in its nature total, where the thing insured is once totally lost to the assured, though it may still remain in specie, the underwriters are bound either to pay the assured the whole value, or to restore the thing in a useful state into his possession. *Falkner v. Ritchie* (a) may perhaps be relied on by the other side, but that is very distinguishable from the present case. There the ship insured was seized by the crew, and plundered and deserted, and afterwards retaken by another ship, and brought, with part of her cargo, to an English port, not the port of her destination, and she could not be made fit for a voyage again without considerable expense; and it was held, that this was not a total loss, so as to entitle the assured to abandon after notice of the recapture. But in that case there was no actual charge upon the vessel; there had been no outlay of money upon her at the time when she was brought into port. Where the damage done to the vessel is equal in amount to her full value, as it is in this case, there is clearly a total loss; and where the ship has been once totally lost to the assured, even though her value exceeds the damage done to her, still, it is submitted,

(a) 2 M. & S. 290.

the claim as for a total loss is good. In such a case the assured is not bound to redeem the ship by paying the charges upon her, nor to discuss with the underwriters the comparative amount of the charges on the one hand and the value of the ship on the other. The underwriters might have redeemed the ship and restored her to the assured, and they not having done so, the assured had a right to abandon. If in the result the ship turns out to be worth more than the charges upon her, that will be matter of advantage to the underwriters; but it is clear, upon the evidence here, that the charges and expenses exceed the sum of 1800*l.*, the amount at which the ship was valued in the policy. There was clearly a total loss when the ship was first deserted, and her subsequent restitution, at an expense exceeding her value, will not convert that into an average loss. It has been decided that an abandonment made after capture, under circumstances which would entitle the assured at the time to recover as for a total loss, is not defeated, so as to become an average loss only, by the mere restitution and return of the ship's hull, before action brought, if the restitution be under circumstances which render it uncertain whether the assured may not have to pay more than its worth; *M'Iver v. Henderson* (a): and the present case falls precisely within the principle of that decision. *Thornely v. Hebson* (b), which will probably be cited on the other side, was a very different case from the present. There a ship being much damaged by tempestuous weather, the crew, completely exhausted, deserted her at sea for the preservation of their lives, and went on board another vessel then in sight, part of the crew of which, being fresh, immediately took possession of the ship, and succeeded in taking her safe into port. The ship was afterwards sold under a decree of the Admiralty Court to pay the salvage, and it was held, that the assured had no right to abandon, and that there was only an average loss. But there the ship was never absolutely abandoned; there was no actual dispos-

(a) 4 M. & S. 576.

(b) 2 B. & A. 513.

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session or dereliction of her; she was never totally left by, and lost to, the assured. That circumstance was relied on by *Bayley, J.*, in his judgment in that case, and sufficiently distinguishes it from the present. The argument is, that where the ship has once been utterly deserted by the crew, and has become once utterly lost and useless to the assured, there a total loss has taken place, which cannot be converted into an average loss by the subsequent recovery of the ship, at least under circumstances like the present, where the expenses attending that recovery exceed or at least equal the value of the ship.

Brougham and Starkie, contra. First, the policy in this case was vacated by the negligence of the captain and the crew. The policy contained an implied warranty on the part of the assured of sea-worthiness in the ship and good seamanship in the crew, throughout the whole voyage. Without contending that the conduct of the crew amounted to barratry, still it is submitted that there was such negligence, and such a want of good seamanship, in this case, as discharged the underwriters from all liability. This is not like the case of *Busk v. The Royal Exchange Assurance (a)*. There the policy expressly insured against fire; the fire was occasioned by the negligence of the mate; and the underwriters were held liable. And properly, for, except in the case of lightning, fire cannot happen in a ship except by negligence; therefore such negligence forms necessarily part of the risk insured against. Here the negligence of the crew, their want of skill and good seamanship, was a species of unseaworthiness, against which there was an implied warranty on the part of the assured. Every ship is liable to make some water, and, up to a certain extent, there may not be any danger to be apprehended from that circumstance. But there are limits beyond which danger must be obvious to every seaman of common prudence and experience. What man of

(a) 2 B. & A. 73.

ordinary skill or prudence would have thought of sailing from New Brunswick on a voyage from thence to Ireland, with a vessel then making nearly a foot water every two hours? A ship so leaky was not sea-worthy; but she was warranted to be sea-worthy at every port she sailed from: therefore it was the duty of the captain to have remained at New Brunswick until he had stopped the leak, and rendered the ship fit for the voyage. Upon this part of the case, *Tait v. Levi* (a) seems an authority in point. There, in a policy on a voyage up the Mediterranean, the underwriters stipulated that they would not be liable higher up than Tarragona. The captain went into Barcelona, an enemy's port, which is higher up than Tarragona, and where the ship was captured. It was held that the assured could not recover, because the mistake of the captain, arising out of gross ignorance, was a failure of the implied warranty on the part of the assured, that a captain and crew of competent skill and knowledge for the known purposes of the voyage should be provided. So, in *Tatham v. Hodgson* (b), it was observed by *Lawrence, J.*, that it had never been decided that a loss arising from a mistake of the captain was a loss by peril of the sea; and in *Polly v. The Royal Exchange Assurance* (c), *Lord Mansfield* said, "If the chance be varied, or the voyage altered, by the fault of the owner or the master of the ship, the insurer ceases to be liable; because he is only understood to engage that the thing shall be done safe from fortuitous dangers, provided due means are used by the trader to attain that end." Secondly, even if the plaintiffs in this case can recover at all, they can recover, at the utmost, only for an average loss. *Thornely v. Habson* (d) is decisive to shew that this was not a total loss. It has been attempted to distinguish that case from the present, by the circumstance of the ship there having been taken possession of by another crew, immediately upon the desertion of


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(a) 14 East, 481.

(b) 6 T. R. 656.

(c) 1 Burr. 341; Park Ins. 45,
1st ed., 5th ed. 41, 17th ed. 67.

(d) 2 B. & A. 513.

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her by her own; but here it does not appear how soon after her desertion the *Westbury* was taken in tow by the *Colombia*, and therefore it may be presumed to have been immediately: for if it had been after any considerable interval, it was for the plaintiffs to have proved that fact, which the defendants, of course, could not by possibility have the means of disproving. The facts of the two cases, therefore, are substantially the same. In both cases the salvors took the ship for the benefit of the owners, not of the underwriters. The possession of the salvor, as observed by *Holroyd, J.*, in that case, is not an adverse possession as against the assured; nor does the mere desertion of the ship by the crew, of itself constitute a total loss. In this case, moreover, it could not have that effect, because it was not a fair and honest desertion, nor one called for by the circumstances. As to the amount of the damage, that cannot be prayed in aid to constitute a total loss, because, independently of the accident which happened to the ship in coming home, the expense of which cannot be taken into the account, the damage was far less in amount than the value of the ship, and therefore left the loss an average loss only.

BAYLEY, J.—With respect to the first question in this case, namely, whether the conduct of the master and mariners was such as to vitiate the policy, there is another case (a) of a similar nature coming under our consideration; therefore we shall not at present give any judgment upon that point. I would just say, however, that though the policy undoubtedly contains an implied warranty of seaworthiness at the commencement of the voyage, I doubt whether that warranty extends to every port from which the ship may proceed in the course of her voyage; and that though the term “sea-worthiness” clearly includes a crew sufficient generally in number and skill for the proper navigation of the vessel, I doubt whether want of skill in

(a) *Shore v. Bentall*, in which the Court have since decided that point against the underwriters.

one particular instance would be sufficient to discharge the underwriters. Upon the second question in this case, namely, whether the plaintiffs, if entitled to recover at all, are entitled to recover for a total or for a partial loss only, I entertain no doubt. I am clearly of opinion that the loss in this case ought to be considered as a total loss. In order to justify the abandonment of the ship, there must be a total loss; that is, not a total loss of the ship itself, absolutely and for ever, but a total loss at some one time of the possession and use of her by the assured. Capture is such a total loss, and justifies abandonment, though the ship remains in specie, and is eventually recaptured and restored. So, I think, the crew's being compelled by fatigue and exhaustion, or for the preservation of life, to leave the ship to the winds and waves, is a total loss, and justifies abandonment. That was the case here. The ship was on her beam ends; the pumps were choked; some of the masts had been cut away; and she appeared to be in a sinking state. Eventually the ship was saved, but not by the ship by which the crew were taken up. The crew of that ship made no attempt to save her; they evidently considered her as a hopeless ship, not worth the chance of endeavouring to save. She appeared to be totally lost, and they left her as such to her fate. Notice of abandonment was given. Ultimately the ship arrived in England; but she had, in my opinion, been once totally lost to the assured; and it seems to me, both upon principle and authority, that her subsequent restoration did not convert that total into a partial loss. *Thornely v. Hebson* (a) does not apply to the present case, because it was held there that the ship was never totally lost, and that was the ground of the decision. *M'Iver v. Henderson* (b), and *Cologan v. The London Assurance Company* (c), are decisive to shew that the restitution of a thing once totally lost will not convert the total into a partial loss, at least unless the

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(a) 2 B. & A. 513.

(b) 4 M. & S. 576.

(c) 5 M. & S. 447.

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restitution be unfettered. It is not enough to restore the ship in specie, she must be restored in an unfettered state, in a state which leaves her possession useful and beneficial to the assured. But that was not the case here. The ship was restored in specie, but with debts upon her altogether exceeding her value. Upon the whole, therefore, I am clearly of opinion that there was a total loss of this ship at one period of time, followed by notice of abandonment by the assured, and not followed by any thing which converted the loss into a partial loss; and consequently that the underwriters continue liable for a total loss.

HOLROYD, J.—I am of the same opinion. There was once a total loss of the ship, and her subsequent restoration under the circumstances proved in this case cannot reduce that to a partial loss. If possession of the ship had been taken by another crew before, or at the moment of her desertion by her own crew, the case would have been different. That is the circumstance which distinguishes this case from *Thornely v. Hebson* (a).

LITTLEDALE, J.—I am also of the same opinion. In *Thornely v. Hebson* the ship was never absolutely deserted or abandoned. Here she was, and was left as and for a total wreck. I do not mean to say that a total loss can never, under any subsequent change of circumstances, be converted into an average loss; *Hamilton v. Mendez* (b), and *Falkner v. Ritchie* (c), are authorities that seem to shew that it may. Whenever that question arises, I shall give it further consideration. But I think it does not arise in this case, or at least that there are other facts here which decide this case in favour of the plaintiffs independently of it. Here the ship came back loaded with a debt and charges upon her exceeding her value. Her liability nearly equalled her value, without including the damage sustained

(a) 2 B. & A. 513. (b) 2 Burr. 1198; 1 W. Bl. 270. (c) 2 M. & S. 290.

on her passage home; and if that be included, which I think it ought to be, there was a loss beyond her value.

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Upon the first question, *Cur. adv. vult.*

Subject to that question, Rule discharged (a).

(a) Afterwards, at the sittings in banc after Trinity term, 1828, *Bayley, J.*, mentioned the case, and said the Court were of opinion that the rule ought to be discharged upon the first question also. They were unanimous in thinking that the implied warranty of sea-worthiness did not extend to the ship being sea-worthy at every port from which she might

depart in the course of her voyage; and with respect to the conduct of the crew having been so negligent as to vacate the policy, they thought it very difficult to say that there had been any negligence at all. The rule, therefore, for entering a nonsuit must be discharged generally.

Rule discharged (b).

(b) Vide *ante*, 680 (a).

DOE, on the Demise of ANN JAMES, v. CHARLES PRICE.

EJECTMENT for premises in the parish of Llantarnan, in the county of Monmouth. At the trial before *Vaughan, B.*, at the last Monmouthshire assizes (a), the case was this:—The lessor of the plaintiff claimed title to the premises in question, as the niece and heir at law of one *John James*; and the only question in issue was, whether a marriage solemnized in the year 1812, between *John James* and a lady whose maiden name was *Martha Absalom*, and of which marriage there was issue, was legal: that is, whether that lady was or was not, at the time of such marriage, a married woman. Notice had been given by the lessor of the plaintiff to the defendant, some time previous to the trial, of her intention to dispute the validity of the marriage in 1812, on the ground of a prior marriage solemnized in the year 1797, between *Martha Absalom* and one *John Evans*; and it was

Where, in ejectment, the plaintiff relies on the invalidity of a second marriage, by reason of a former marriage by licence, one of the parties being a minor, and defendant has notice that the question intended to be raised is whether the first marriage was with consent of the minor's parent, it lies upon defendant to disprove consent. And

(a) Counsel for the plaintiff, *W. E. Taunton* and *Maule*; for the defendant, *Ludlow* and *Russell*, Serjts.

the Court will not grant a new trial to let in evidence negating such that evidence might have been produced at the first trial.

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proved in evidence that a marriage by licence did take place at that time between those parties, *Martha Absalom* being then a minor. The entry in the register did not state the marriage to have been had with consent of parents; but much evidence was given on the part of the lessor of the plaintiff, to shew that the father of *Martha Absalom* knew and must have approved of the marriage. It was contended on the part of the defendant, that positive affirmative evidence of the father's consent was absolutely necessary to support the action, and to satisfy the requisites of the statute (a); but the learned Judge told the jury that in his opinion evidence of circumstances in the conduct of the father, importing knowledge and approbation of the marriage, was sufficient, without positive proof of a written or verbal consent. The jury, under this direction, found the fact of consent, and a verdict for the plaintiff. In last Michaelmas term, a rule nisi for a new trial was obtained upon affidavits stating various circumstances tending to negative the fact of consent, and setting out the affidavit made by *John Evans* for the purpose of obtaining the licence, in which he deposed that both he and *Martha Absalom*, were at that time, according to the best information he could procure, twenty-one years of age.

W. E. Taunton and *Maule* shewed cause. The balance of evidence was greatly in favour of the validity of the first marriage of *Martha Absalom*, that is, that it was had with the consent of her father. The defendant did not give any evidence at the trial to negative the fact of consent, which, under the circumstances of the case, it was his duty to do. He received notice long before the trial of the lessor of the plaintiff's intention to dispute the validity of the second marriage; therefore he was fully apprised of the case to be

(a) 26 Geo. 2, c. 33, s. 11, which enacts that all marriages solemnized by licence, where either of the parties, not being a widower or

widow, shall be under the age of twenty-one years, which shall be had without the consent of father, guardian, &c. shall be void.

set up against him, and might and ought to have gone to trial perfectly prepared with evidence to meet it. He cannot support this motion on the ground of surprise, for the evidence which he now lays before the Court in his affidavits might have been produced at the trial by means of witnesses, who would then properly have been subject to cross-examination: and it would be highly dangerous for the Court to allow a defendant, after he has by one trial obtained a full knowledge of his opponent's case, to obtain a second trial by means of affidavits, supplying facts which he was bound to have known and proved at the first. Upon every principle it is clear that it was for the defendant to prove non-consent, and not for the plaintiff to prove consent. The marriage took place thirty years before the trial, and after such an interval proves itself, or at least must be presumed to have been regular and legal; for the law will presume every thing possible to be presumed in favour of the validity of a marriage and the legitimacy of children. The words of the statute 26 Geo. 2, c. 33, s. 11, "without consent," shew that it was the intention of the legislature to cast the burthen of proof upon the party disputing the validity of the marriage; and there are cases in the books supporting that construction. In *Rex v. Rogers* (a) it was held necessary, in support of an indictment under the statute 42 Geo. 3, c. 107, s. 1, for coursing deer in an inclosed ground "without the consent of the owner thereof," to call the owner of the deer to prove that he did not give his consent to the prisoner to course them. In *Williams v. The East India Company* (b), where a plaintiff declared that the defendants, who had chartered his ship, put on board a dangerous commodity, by which a loss happened, without due notice to the captain, or any other person employed in the navigation, it was held that it lay

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(a) 2 Campb. 654.

851; Lord *Halifax's* case, Ball.

(b) 3 East, 192; and see *Monke v. Butler*, 1 Rol. Rep. 83, there cited; *Powell v. Milbank*, 2 W. Bla.

N. P. 298; *Rex v. Combs*, Comb. 57; Gilb. Ev. 132; 1 Phil. Ev. (4th ed.) 196, 220; Roscoe, Ev. 41.

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upon the plaintiff to prove that negative averment. And that decision was founded upon a principle which applies expressly to the present case, namely, that where any act is required to be done by one, the omission of which would make him guilty of a criminal neglect of duty, the law presumes the affirmative, and throws the burden of proving the negative on the party who insists on it. But even if the consent required by the 26 Geo. 2, c. 33, s. 11, cannot be presumed in this case, still it is submitted that the subsequent statutes, 3 Geo. 4, c. 75 (a), 4 Geo. 4, c. 17 (b), and 4 Geo. 4, c. 76 (c), have repealed the former act, or at least have legalized marriages which would not have been legal under the former act. These statutes are, undoubtedly, extremely obscure (d), and it is no easy matter to predicate with certainty what are their effect and operation retrospectively one upon the other; but according to the ordinary rules of construction, it does appear that the marriage

(a) The 3 Geo. 4, c. 75, s. 1, repeals the 26 Geo. 2, c. 33, s. 11, that makes void marriages of minors by licence, without the consent of parent or guardian, as far as the same shall relate to any marriages *thereafter* to be solemnized.

Sect. 2 declares, that all such marriages, which were solemnized *before* the passing of the act, shall be valid, where the parties have lived together until the death of one of them, or until the passing of the act.


(b) The 4 Geo. 4, c. 17, s. 1, repeals several of the clauses of the 3 Geo. 4, c. 75, and then enacts, "that all marriages which have been or shall be solemnized under licences granted, or bans published, conformably to the provisions of the said recited act, (3 Geo. 4, c. 75,) shall be good and valid; provided always, that no marriage solemnized under any

licence granted in the form and manner prescribed by either of the said recited acts, (26 Geo. 2, c. 33, and 3 Geo. 4, c. 75,) shall be deemed invalid on account of the want of consent of any parent or guardian."

(c) The 4 Geo. 4, c. 76, repeals, after the 1st Nov. then next, the acts of 26 Geo. 2, c. 33, and 4 Geo. 4, c. 17, "save and except as to any acts, matters, or things done under the provisions of the said recited acts, or either of them, before the said 1st Nov., as to which the said recited acts shall respectively be of the same force and effect, as if this act had not been made, save also and except so far as the said recited acts, or either of them, repeal any former act, or any clause, matter, or thing therein contained."

(d) Vide *Rex v. Birmingham*, post, vol. ii.

in this case, even supposing that consent cannot be presumed, or had been disproved, is rendered valid by the last act of parliament.

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Ludlow and Russell, Serjts., contrâ. The recent marriage acts have no sort of bearing upon the present case. The 3 Geo. 4, was indeed both retrospective and prospective; but that was repealed by the subsequent acts, which are prospective only. At any rate, those acts could only have applied in the event of the parties having lived together down to the death of *John Evans*: to give them the effect contended for on the other side would be to disinherit the issue of the second marriage. The ground on which the defendant rests his application for a new trial is, not that of surprise, but that the lesser of the plaintiff, as the party claiming under the first marriage, was bound according to the law of evidence to prove affirmatively that it was had with consent of parents. The doctrine of presumption is decidedly in favour of the defendant, because the law in this case cannot presume the first marriage to have been legal, without also presuming the commission of the crime of bigamy. Now it is clearly settled by the cases of *Rex v. James* (a), *Rex v. Morton* (b), and *Rex v. Butler* (c), that such a presumption cannot be raised, and that in an indictment for bigamy, the burthen of proving a legal marriage, conformably to the provisions of the statute, lies upon the prosecutor. So in *Rex v. Twynning* (d), upon a question of settlement, where a woman, twelve months after her first husband was last heard of, married a second

(a) R. & R. C. C. 17.

(b) R. & R. C. C. 19, note.

(c) R. & R. C. C. 61. In this latter case it is, however, to be observed, that one of the grounds of the decision of the Judges is reported to have been, "that there were no circumstances from which consent could be presumed;" and

the Reporters have added, in a note, that "it seems that any subsequent countenance from parents or guardians, or other circumstances of a similar kind, might afford ground for presuming the necessary consent."

(d) 2 B. & A. 386.

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husband, and had children by him, it was held, on appeal, that the sessions did right in presuming *prima facie* that the first husband was dead at the time of the second marriage; and that it was incumbent on the party objecting to the second marriage, to give some proof that the first husband was then alive: and that decision proceeded upon the very principle relied on by the other side, namely, that the law always presumes against the commission of crime.

BAYLEY, J., (after consulting with the other Judges).—We think that we should be working great injustice if we were to grant a new trial in this case, because we should be giving encouragement to parties to go to trial without duly preparing themselves with evidence even on points which they knew beforehand would be made matters of dispute. It cannot be permitted that either party shall produce just so much evidence as he thinks proper, and then stop short, and ultimately obtain a new trial, on the ground that he did not on the first trial give all the evidence which he then might and has since found he ought to have given. In this case the defendant had a perfect knowledge of all the facts of the case; he was fully apprised, by the notice served upon him, of the nature of the question which he would have to discuss; and it was his bounden duty to have procured every description of evidence that was calculated to negative the fact of the first marriage having been solemnized with the consent of parents. He did furnish himself with evidence upon that point to a certain extent; but to a certain extent only. He must have known, that in order to obtain the marriage licence, an affidavit would be necessary; and he ought to have obtained a sight of that affidavit, and have ascertained whether its contents would assist him. That ought to have been done before the trial; and the subsequent production of the affidavit ought not to hold out to the Court any inducement to grant a new trial. Indeed, it is one of the duties of the Court to guard themselves strictly against falling into the practice; or entertain-

ing the principle, of granting new trials, merely for the purpose of letting in evidence which might and ought to have been produced at the former trial. We do not say that the questions now submitted to the Court are not material and worthy of consideration; we only say that they do not furnish grounds for granting a new trial; and, in order to prevent a change of possession, and the hardship which would follow therefrom to the defendant, we shall impose certain terms upon the lessor of the plaintiff. This rule for a new trial will be discharged; the plaintiff to be at liberty to sue out a writ of *fiery facias* for the costs, but to be restrained from suing out a writ of possession until the first day of next Michaelmas term, in order to give the defendant in the mean time opportunity to bring an ejectment; and, in that action, the judgment in the present action not to be given in evidence.

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Rule discharged accordingly.

The KING v. The INHABITANTS of ROLVENDEN.

ON appeal to the court of quarter sessions for the county of Kent, against an order of two justices, for the removal of *John Field*, from the parish of Lynsted to the parish of Rolvenden, both in the said county; the order was confirmed, subject to the opinion of this Court upon the following case:—

In the month of June, 1820, the pauper agreed with *William Masters*, an innkeeper, living in the parish of Rolvenden, to serve him as an ostler. The pauper and his master bargained by the week, at 2s. per week in the summer, and 1s. 6d. per week in the winter. The pauper entered into the service on the 22d of June, 1820. He received 2s. per week till the following Michaelmas; from Michaelmas to Lady-day, 1821, 1s. 6d. per week; and from Lady-

A pauper agreed with an innkeeper to serve him as ostler, at 2s. a week in the summer, and 1s. 6d. a week in the winter: Held, that this was a weekly hiring only, and that a year's service under it conferred no settlement.

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day to Michaelmas, 2s. per week. On the evening of the 23d of February, 1823, the pauper left his master's service, in consequence of a disagreement that took place between his master and him on the morning of that day. The question for the opinion of the Court is, whether by the above contract and the service under it, the pauper gained a settlement in the parish of Rolvenden.

D. Pollock, in support of the order of sessions. Unless this case can be distinguished from that of *Rex v. Warminster (a)*, it must be admitted that there was no yearly hiring here, and therefore that the order of sessions was wrong; because it was there decided, that a hiring for an indefinite period, at 6s. a week for the winter, and 9s. a week for the summer, was not a yearly hiring, and that a year's service under it would not confer a settlement. But it is submitted that the two cases are distinguishable. In *Rex v. Warminster*, the pauper asked 20l. a-year wages, which the master refused to give, and they afterwards agreed for weekly wages; so that there was an express proposal for a yearly hiring on the one side, and an express repudiation of it on the other. But in the present case nothing occurred to rebut the presumption that the hiring was intended to be for a year; and the agreement for a different rate of wages at different seasons of the year, leads strongly to the inference that both parties contemplated a continuance of the service for a year. If so, no time being mentioned, the hiring was a general one, a year's service under which converts it by operation of law into a yearly hiring, and confers a settlement.

Law, contra, was stopped by the Court.

BAYLEY, J.—I cannot distinguish this case from that of *Rex v. Warminster*. The argument last advanced to-day was relied upon there, but was not acted upon by the Court.

(a) 9 D. & R. 70; 6 B. & C. 77; 4 D. & R. M. C. 197.

There is no weight in that argument. The hiring here is for an indefinite period, at weekly wages, which is a weekly hiring. The mere arrangement that the wages shall be at one rate in the summer, and at another in the winter, does not shew that the parties contemplated a service to endure through the summer and the winter, and, therefore, that they intended a hiring for a year; but shews, only, that they intended that *if* the servant, being hired at weekly wages, should remain till the summer, he should then have so much per week, and if he should remain till the winter, he should then have so much per week. The true meaning of such an arrangement is merely this: that the servant's wages, as a weekly servant, are to be regulated by the season. Looking at the terms of this contract altogether, they seem to me, clearly, to constitute only a weekly hiring, no service under which could confer a settlement. The order of sessions, therefore, must be quashed.

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The other Judges concurring,

Order of Sessions quashed.

The KING v. The INHABITANTS of KIBWORTH
 HARCOURT.

ON appeal made to the court of quarter sessions for the county of Leicester, against an order of two justices, for the removal of *James Asker, Elizabeth* his wife, and their five children, from the parish or township of Kibworth Beauchamp, to the parish or township of Kibworth Harcourt, both in the said county; the order was confirmed, subject to the opinion of this Court upon the following case:—

After proof, *primâ facie*, of a settlement in the appellants' township, it appeared, that about Lady-day, 1825,

To acquire a settlement by renting a tenement under 6 Geo. 4, c. 57, the renting need be *bonâ fide only* as between the landlord and tenant; and the whole rent need not be paid by the person renting the tenement, it is enough if it be *actually paid*.

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the pauper took of one *Thomas Bradshaw* a house and garden, situate in the township of Kibworth Beauchamp, at the rent of 10*l.* for a year, to commence at the ensuing Michaelmas. The house and garden were then in the occupation of one *Cooper*, whose term in them expired at Michaelmas; but *Bradshaw* said he should expect *Cooper* to stand as tenant till Michaelmas, and should expect the rent when one *Matthew Waterfield*, who was tenant of other premises to *Bradshaw*, paid his; and it should all be put in one receipt. The pauper was let into possession immediately by *Cooper*, and paid rent up to Michaelmas to *Cooper*; after which time he continued to occupy the premises, and paid rent, as after-mentioned, up to Michaelmas, 1826. Early in the pauper's tenancy, *Matthew Waterfield*, then being churchwarden of the township of Kibworth Beauchamp, called upon the pauper, and represented to him that *Bradshaw* had let the pauper's premises, together with other premises, to him, *Waterfield*; and that the pauper was thenceforth to pay the rent quarterly to him. At the same time, *Waterfield* told the pauper that he should make a reduction in his rent of 8*s.* a year, to which reduction the pauper assented, and a rent of 9*l.* 12*s.* was accordingly paid by the pauper to *Waterfield*, in the course of that year, by four quarterly payments; namely, the first two payments to *Matthew Waterfield*, and the last two, after the death of *Matthew*, to *John Waterfield*, his brother and successor in the premises. At the end of the year, a sum of 55*l.* was carried by *John Waterfield* to *Bradshaw*, the landlord, which sum included 10*l.* for the pauper's rent of the house and garden, for the year just completed, and the residue was composed of rent for the other premises occupied by *Waterfield*. *Bradshaw* returned 5*l.* to *Waterfield*, and gave him one receipt for the whole rent. It further appeared, that *John Waterfield* was reimbursed out of the parish funds the sum of 8*s.*, paid by him to the landlord, over and above the 9*l.* 12*s.* The court of quarter sessions found that there was fraud in this case, on the part of the

township of Kibworth Beauchamp, but that neither the landlord, nor the pauper, was a party to the fraud.

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Reader and Homfrey, in support of the order of sessions. The sessions were right. The pauper did not acquire a settlement by renting a tenement in Kibworth Beauchamp, either under the 59 Geo. 3, c. 57, which was in force when the contract was made, or under the 6 Geo. 4, c. 50, which was in force when the rent was paid. The former act requires that the rent of 10*l.* for the tenement shall be actually paid, for one whole year, *by the person hiring the same*; whereas here the pauper, who was the person hiring the tenement, himself paid only 9*l.* 12*s.*, the residue, 8*s.*, being paid by *Waterfield*, the churchwarden. The latter act does not require that the whole rent shall be paid by the person hiring the tenement, but it does require that the tenement shall be *bonâ fide rented by such person, at and for the sum of 10*l.* a year*. Now that requisition has not been complied with here, because the sessions have found that there was fraud in the case; and though they have also found that neither the landlord nor the pauper was a party to the fraud, still the tenement cannot be said to have been *bonâ fide rented*, because fraud, wherever it arises, vitiates the whole contract.

Marryat, *Dwarrris*, and *Hildyard*, *contrâ*, were stopped by the Court.

BAYLEY, J.—I am of opinion that the pauper did acquire a settlement by renting a tenement in the township of Kibworth Beauchamp, under the 6 Geo. 4, c. 57. The renting, upon which the question in this case depends, did not commence till Michaelmas, 1825, after that act came into operation; therefore, the former act of 59 Geo. 3, c. 50, does not appear to me to bear upon the case. The new act does not require that the whole rent shall be paid by the person hiring the tenement, but only that it shall be

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"actually paid." Here the whole rent of 10*l.* was actually paid; and though a part of it was paid, not by the pauper, but by a third person, still, the whole having been paid, I think the requisites of the statute have been satisfied in that respect. With respect to the question of fraud, the case finds that neither the landlord nor the pauper was a party to the fraud; and though the act requires that the tenement shall be "*bonâ fide* rented," I think that expression can only be construed to mean that the renting shall be *bonâ fide* as between the landlord and tenant. Here the renting was *bonâ fide* as between the landlord and tenant. It seems to me, therefore, that all the requisites of the 6 *Geo.* 4, c. 57, have been complied with in this case, that a settlement has been gained under that act, and, consequently, that the order of sessions must be quashed.

The other Judges concurred.

Order of Sessions quashed (a).

(a) See *Rex v. Carshalton*, 9 D. & R. 132; 6 B. & C. 93; 4 D. & R. M. C. 249.

DOE on the Demise of HENNIKER, Esq. v. WATT.

In an agreement enuring as a lease, "It is stipulated and conditioned that the lessee shall not underlet:"—Held, that these words create a condition; upon a breach of which the lessor may maintain ejectment, without an express clause of re-entry.

J.C. 2024. 300.
EJECTMENT for lands at Moorlinch, in the county of Somerset. At the trial before *Burrough*, J., at the last Bridgwater assizes (b), the following paper, stamped with a lease stamp, was given in evidence by the plaintiff:—

"Memorandum of agreement made with *George Watt* (defendant), bailiff of the manor of Chalcott otherwise Catcott, in the county of Somerset. The said *George Watt*, in consideration of the rent and conditions hereinafter mentioned, is to have, hold, and occupy, as on lease, every part and parcel of all that piece or tract of turbary land, commonly

(b) Counsel for the plaintiff, *Wilde*, Serjt., and *Moody*; for the defendant, *Jeremy*.

called 'The five hundred acres,' situate in the said manor, which may now be in hand and disengaged or unlet, for the term of 21 years, from Lady-day, 1825, at the yearly rent of 5s. an acre, payable quarterly, and free and clear of all charges, rates, and outgoings whatsoever; and is likewise to have, at the like rent of 5s. an acre, all and every parcel of the said five hundred acres which may fall in hand and become unlet between this time and the expiration of the said term of 21 years. Provided always, that the entire or total quantity of land in the said five hundred acres, so occupied by the said *George Watt*, by virtue of this agreement, shall never exceed 100 acres in the whole, and that the term or lease of all and every parcel occupied or possessed under this agreement shall cease or determine in 21 years from Lady-day aforesaid. And it is *stipulated* that no house or cottage, stable or other substantial building, nor any parcel on which such building now stands or may hereafter be erected, shall be included in or leased, by virtue of this agreement. And it is further *stipulated and agreed* that the said *George Watt* shall take and occupy, at the rent aforesaid, every parcel of land in the said five hundred acres, as the same may fall in hand, without choice, exception, or refusal, until the total quantity amounts to 100 acres, as before mentioned. And also that the said *George Watt* shall, on possession, proceed to cultivate and improve every parcel, as the same comes to his occupation, whether it be late or early in the said term of 21 years, in like manner or method as he means towards the parcels of which he has immediate possession. And lastly, it is *stipulated and conditioned*, that the said *George Watt* shall not assign, transfer, underlet, or part with any part or parcel of the said lands or premises, otherwise than to his wife, child or children. Dated this 24th October, 1825.

(Signed)

GEO. WATT."

Some of the land had fallen into hand, subsequently to which the plaintiff proved an underletting by the defendant.

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On the part of the defendant it was insisted that the clause in the memorandum, prohibiting an under-lease, did not amount to a condition. The learned Judge being of a different opinion, the defendant put in a letter of the lessor of the plaintiff, in which he says, "How much land have you in hand? let me know what you can let it for, then I shall know what it is worth." The defendant's mother stated, that she went with her son to the lessor of the plaintiff, who asked defendant what he would take for his land. Defendant mentioned a price; upon which the lessor of the plaintiff said, "then let it, and I shall know what it will produce next year." The learned Judge thought that the supposed waver did not apply to the land in question, inasmuch as defendant, under the agreement, was not to have the whole turbary, but 100 acres out of 500; and he directed a verdict for the plaintiff, giving leave to the defendant to move to enter a nonsuit. A rule having been obtained for a nonsuit or a new trial,

Moody now shewed cause. By the instrument of 24 October, 1825, a forfeiture was created without an express clause of re-entry. The words "condition," or "conditioned," require no additional term. This is clear from *Littleton*, sections 328 (a), 329 (b), and 330 (c). [*Holroyd, J.*

(a) Item, there are divers words (amongst others) which, by virtue of themselves, make estates upon condition: one is the word *sub conditione*, as if *A.* enfeoff *B.* of certain land, *habendum et tenendum eidem B. et hæredibus suis sub conditione quod idem B. et hæredes sui solvant, seu solvi faciant præfato A. et hæredibus suis annuatim talem redditum, &c.* In this case, without any more saying, the feoffee has an estate upon condition.

(b) Also if the words were such, "Proviso semper quod prædictus

B. solvat seu solvi faciat præfato A. talem redditum, &c.;" or these, "*Ita quod prædictus B. solvat seu solvi faciat præfato A. talem redditum, &c.*" In these cases, without more saying, the feoffee has but an estate upon condition; so that if he do not perform the condition, the feoffor and his heirs may enter, &c.

(c) Item, there are other words in a deed which cause the tenements to be conditional. As if upon such feoffment a rent be reserved to the feoffor, &c.; and afterwards it is stated in the deed,

The latter part of section 329 is material.] So Sheppard says (a), "*Proviso, ita quod, and sub conditione, of their own nature make the estate conditional.*" If this had been a conveyance of a freehold interest, it would have been impossible to contend that the estate was not conditional. It will, perhaps, be said, that the same rule does not apply to a lease for years. But that which would work a forfeiture of a freehold, would, *à fortiori*, destroy an estate for years. This is expressly laid down in Co. Litt. 204, a (b). Nor can it make any difference whether the instrument creating the estate for years is under seal or not, for a condition may be by parol. Littleton says, s. 365, "But of chattels real, as of a lease for years, &c., a man may plead that such leases or grants were made upon condition, without shewing any *writing* of the condition." [Holroyd, J. In old authors "*writing*" means a deed.] Several instances of conditions in instruments not under seal are mentioned in Viner (c). So in Plowd. 142 (d). [Littledale, J. Littleton, s. 331, is most material as to the necessity for a clause of re-entry. Holroyd, J. Where there are words of condition, and not of limitation, the right of re-entry would follow of course; but if these are words of limitation they would not operate without an express power of re-entry. This is the clause in Litt. s. 329, which appeared to me to be material. Littledale, J. "Upon condition," is different from "it is conditioned" (e). If it had been "upon condition," there could have been no doubt.] "*Ad*

"quod si contingat redditum prædictum a retro fore in parte vel in toto, quod tunc bene licebit for the feoffor and his heirs to enter, &c." This is a deed upon condition.

(a) Touchstone, 120.

(b) "But for the avoyding of a lease for yeares such precise words of condition are not so strictly required as in case of freehold and inheritance. For if a man by deed make a lease of a manor for

yeares, in which there is a clause, (and the said lessee shall continually dwell upon the capitall messuage of the said manor, upon paine of forfeiture of the said terme,) these words amount to a condition."

(c) 5 Vin. Abr. 67, Condition, O.

(d) Argument of *Catline*, Serjt., in *Browning v. Beston*.

(e) "To condition," is defined by Johnson, "to make terms, to

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erudiendum" makes a condition (a). "Conditioned" must mean subject to a condition, particularly where they refer to a condition in the beginning. Any words by which the intention of the parties appears are sufficient, *Butler v. Wegge* (b). Here it is shewn to be, that defendant should have a lease subject to a condition. [*Bayley, J.* By "stipulate" and "agree," they seem to mean the same thing. Must not "conditioned and agreed" be understood to be used in the sense of "agreed?" (c)]

Jeremy, contra. Every condition ought to be created by the words of the grantor. Lord *Cromwell's* case (d). Here is only one party. But supposing the words to be the words of both, they are not sufficient to create a condition. Lord *Coke* (e) puts four clauses, and says, that "*quod si contingat*" requires further words of re-entry. Even "*sub conditione*" is not always sufficient. A condition should be for the benefit of the party stipulating. It must operate to destroy the whole estate, or it cannot operate at all. *Corbet's* case (f). *Cowper v. Andrews* (g). Conditions cannot take effect by piecemeal or *pedetentim*. A condition cannot be created but by deed. 5 Vin. Abr. 69.

stipulate;" and cites from *Ra-leigh's* History—"It was *conditioned* between Saturn and Titan, that Saturn should put to death all his male children." "It is stipulated and conditioned," must be considered either as the words of the lessor or of both parties. If we read, "it is stipulated and conditioned by the lessor," the expression seems to be equivalent to "the lessor stipulates and makes it a term of the contract, that, &c.;" if the words are taken as the language of both parties, then the clause will read, "it is stipulated and conditioned by the lessor and lessee, that, &c." in which case both the words "sti-

pulate" and "condition" would have been used in a lax and improper sense, and as equivalent to the term "agree." In this sense, indeed, the word "stipulate" is often used; though in strictness it relates to the act of the promisee in exacting and accepting the promise, *promittenti assentire*.

(a) Plowd. 142, arg. And see *Brookham's* case in the Exchequer, *Littleton's* Rep. 120, 136.

(b) 1 Sauud. 65.

(c) *Vide ante*, 697 (e).

(d) 2 Co. Rep. 69, b.

(e) Co. Litt. 203.

(f) 1 Co. Rep. 86, b.

(g) Hob. 43, arg.

In *Machel and Duntton's* case (a), where a lessor devised lands to his lessee for a further term, yielding such rents and performing such covenants as the lessee held under by the former lease, the Court said that this could not make a condition, for a condition is a thing odious in law, which shall not be created without sufficient words. If this had been a lease, it would have been open to the plaintiff to have raised the point, but here the defendant is to take on lease. [*Bayley, J.* It is not "to have a lease of," but "to take on lease."] Supposing a condition to have been broken, the lessor of the plaintiff has waived the breach. [*Bayley, J.* It is rather a licence than a waiver.]

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Cur. adv. vult.

BAYLEY, J., now delivered the judgment of the Court. This was an ejectment brought upon the ground of a breach of a condition. Two questions arose; first, whether the agreement between the parties contained a condition or not, or whether there was any condition; and, secondly, whether the plaintiff had not destroyed all right in himself to insist upon and to say that there had been a breach of the condition, because nothing had been done except under his sanction and with his concurrence. Upon the argument, the Court felt very strongly that the latter question ought to have been presented to the consideration of the jury; and therefore, if there was a condition in the case, there ought to be a new trial; but if the agreement did not raise a condition, then, liberty having been reserved at the time of the trial to enter a nonsuit, a nonsuit ought to be entered (b). The question, therefore, is, whether there was a condition or not. The parties stood in the relation of landlord and tenant; and there was a memorandum of agreement made between *George Watt*, the defendant, and the lessor of the plaintiff, by which the defendant, in consideration of the rent and conditions

(a) 2 Leon. 33.

(b) *Vide ante*, 246.

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thereinafter mentioned, was to have part and parcel of the tract of turbary land, called "the five hundred acres." He was to take it, as it came in hand and disengaged, for the term of 21 years from Lady-day, 1825, at the yearly rent of five shillings per acre, payable quarterly, clear of all charges and outgoings whatsoever, and to pay the like rent of five shillings for all and every parcel of "the five hundred acres" which might fall into hand or come into possession before the expiration of the said term of 21 years, with a proviso, that what he should have, should never exceed one hundred acres in the whole. Then there was a stipulation that no house or cottage, stable or other building, should be erected on any part of the said premises. It was further stipulated and agreed, that *Watt* should take and occupy, at the rent aforesaid, every parcel of the land in the said five hundred acres, as they might fall into hand, without choice or refusal, until the total amounted to 100 acres aforesaid; and also that *Watt* should proceed to cultivate, and so forth. Then you come to the clause on which the question arises, whether it created a condition or not. And lastly, it is stipulated and conditioned, that the said *George Watt* shall not assign, transfer, or underlet, or part with any part or parcel of the lands or premises, otherwise than to his wife, child or children. This was a document not under seal, and it was insisted on the part of the defendant that it was not an instrument calculated to raise a condition. The circumstance of its not being under seal is clearly immaterial; because, when a party is the owner of a property, and parts with that property by any instrument whatever, he may impose such terms and conditions as he thinks proper; and he may in any instrument introduce a condition, provided that proper and apt words for that purpose are used. The common words of a condition are, "provided always," "*ita quod*," "on condition," and so on; but there is no particular form of words calculated to raise a condition (a).

(a) *Ante*, 698.

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In this case it was said at the commencement of it, that it was in consideration of the covenants and conditions; and then there was, perhaps, a looseness of expression as to the terms from time to time used. In one part it was "stipulated," in another part "stipulated and agreed;" and in the part in question it was "stipulated and conditioned." There is no doubt but that in the part in question the words are the words of the landlord. A stipulation to restrain the party from assigning, transferring, and underletting, would naturally be a stipulation on the part of the lessor. The lessee would never stipulate for the purpose of imposing a restriction on himself. Therefore the stipulation there must be considered as a stipulation in the words of the landlord. Where you use the words "condition," is not the word "condition" fairly and properly a word of condition? Is not the common and ordinary meaning of the word condition, "upon the condition following?" When you have a bond with a condition, how do you construe and describe that in pleading? You invariably say, which said bond was conditioned so and so; if that would be the meaning of the word "condition" in pleading, it is for you to consider it as being the meaning of it when you have the words "stipulated and conditioned." It was said the words, "stipulated and conditioned," the two words being used together they meant one and the same thing, and that they sounded rather in covenant, than in covenant and condition. There are several authorities which lay down the position, that if you use words of covenant and words of condition also, both shall operate, that you may maintain an action of covenant on the words of the covenant, and you may bring an action upon a condition on the words of a condition. Therefore, if the word "stipulated" implies and raises a covenant, the word "condition" would also raise a condition. There are two or three cases which I can refer to on that point, and I take it to be quite clear. In *Cro. Elizabeth*, 242, (a), the lease said, "provided

(a) *Simpson v. Titterell*.

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always, and it is further covenanted, that the lessee shall not assign except to the lessor." The lessee assigned, and on a question in an ejectment, if this were condition or covenant, all the justices held it to be a condition; for it is a rule when there is a proviso, that the lessee shall do or not do a given thing, and there is no penalty, it is a condition, otherwise it is void. Another case is Lord *Pembroke* and Sir *Henry Berkley* (a). That was the case of a grant of a walk in a forest, and it was provided in the grant, that the party should not fell any wood. There the question was, whether this was a condition or a covenant, *Gawdy* and *Clench* thought it was a covenant only, but *Popham* and *Fenner* thought it was a condition. Those Judges held it to be a condition, and they would not suffer it to be argued because it had been disputed among them before judgment, and judgment was given by their advice that it was a condition. In *Cro. Elizabeth* 486 (b), it was agreed that *A.* should let to *B.* for five years to Michaelmas next; provided always that *B.* should pay the annuity (during the term) of 120*l.* a-year at Michaelmas and Lady-Day. *A.* brought debt for the arrears of the 120*l.*, and whether this proviso was a good reservation or a condition only, was the question, there being no words of agreement to pay, nor any express words of reservation. But the Judges held that it was a good reservation, and *Popham* said it was a reservation, and a condition also, as in Sir *Henry Berkley's* case, where the words made it a condition and covenant also. In *Coke Littleton*, 203, a man by indenture let land, "provided always, and it was further covenanted and agreed that the lessee should not alien." It was adjudged this was a condition, but also a proviso in a covenant by force of the other words. We are therefore of opinion in this case, that this is a condition. Then upon the question whether or not the plaintiff was in a condition to insist on the breach of this condition, there was the evidence of the defendant's mo-

(a) *Cro. El.* 384.(b) *Harrington v. Wise.*

ther (a). It was said on behalf of the lessor of the plaintiff, that the learned Judge was of opinion, at the time of the trial, it did not refer to the land in question, and therefore he did not think he should do right if he left it to the jury; but on looking to the whole of the report, we cannot see to what other land it could refer. He asks what he will take for his land, and he had no other land except that which was the subject of this contract; and when he mentioned the price, he said "No, let it; because if I see for what you let it, as you are only to give me five shillings an acre, I shall be able, by estimating the difference of that between the price you let it and the five shillings, to ascertain if what I can give you is a fair and reasonable compensation for the benefit you have in the estate." We are of opinion in this case, therefore, that there ought to be a new trial.

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Rule absolute.

(a) *Ante*, 696.

CORNISH and another v. SEARELL.

ASSUMPSIT for use and occupation. Plea, non assumpsit. At the trial at the last assizes for the county of Devon (b), before *Littledale*, J., the facts of the case appeared to be these:

On the 25th of June, 1816, *Allen Searell*, the father of

(b) Counsel for the plaintiff, *Merewether*, Serjt., and *Bayly*; for the defendant, *Wilde*, Serjt., and *Manning*.

Pending a demise by deed from A. to B., a sequestration issues out of Chancery against A.—B. signs an unstamped paper, purporting that

he attorns and becomes tenant to the sequestrators, to hold on such terms as may be afterwards agreed on:—Held, first, that the sequestrators could not maintain use and occupation against B., because an attornment infers a continuance of a subsisting tenancy, which here was by deed: secondly, that the sequestrators had no estate to which an attornment would apply: thirdly, that the instrument, if it had any operation, would operate as a new demise, and could not be read without a stamp. A tenant who attorns to a party from whom he did not receive the possession, is not estopped from shewing want of title in such party.

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the defendant, demised the premises in question to the defendant, *habendum* from the 25th of March then last, for the term of 21 years, if the estate and interest of the said *Allen Searell* therein should so long continue, at the rent of 30*l.*, payable yearly. On the 8th of March, 1825, an order was made by the Court of Chancery, in a cause in which *Marshall, Drake, and Browne*, were plaintiffs, and *Allen Searell* was defendant, directing *Allen Searell* to pay over to *Bentall*, the receiver appointed in the cause, certain sums of money. Upon this order a writ of execution issued, tested on the 19th of March, 1825. This writ having been disregarded, a sequestration issued; and the sequestrators having applied to the present defendant, as the party in possession, he signed the following instrument;

" 31st January, 1826. I do hereby attorn and become the tenant of a certain estate and premises called *Goulds*, and also of certain closes of land and orchard and premises, called *Cleave and Westaway*, situate in *Staverton*, in the county of *Devon*, to *James Cornish* and *Frederick Angel*, two of the sequestrators named in a certain writ of sequestration issued in a certain cause now pending in the Court of Chancery, between *Richard Marshall, George Drake, and Alan Browne*, plaintiffs, and *Allen Searell*, defendant; and to hold the same for such time, at such rent, and on such conditions as may subsequently be agreed on between me and the sequestrators aforesaid.

Witness, (Signed) *John Searell*.
 (Signed) *Allen Searell, jun.*"

The annual value of the premises was estimated by surveyors at 75*l.* or 80*l.* Upon this evidence it was objected that the instrument of the 31st of January, 1826, did not recognise or create any relation of landlord and tenant between the plaintiffs and defendant; that if that relation was created, it would constitute all the sequestrators joint landlords, who should therefore all have joined in suing as co-plaintiffs; that supposing this to be evidence of the

creation of a tenancy, it would require a stamp; that supposing it to operate as an attornment, it was an attornment to a subsisting tenancy by deed. The learned Judge was of opinion that there was considerable weight in these objections, but thought that the case had better go to the jury, giving the defendant leave to move to enter a nonsuit in case the verdict should be against him. His lordship also pointed out another difficulty, namely, that no application had been made to the defendant to agree upon the terms of the future holding, agreeably to the stipulation in the instrument of attornment. The jury found a verdict for the plaintiffs, damages 30*l.*, as for one year's rent.

In last Michaelmas term, *Wilde*, Serjt., moved accordingly to the leave reserved, and obtained a rule nisi for entering a nonsuit: against which,

Merewether, Serjt., and *Bayly*, now shewed cause. It lay upon the plaintiffs to shew that the defendant was actually in possession, that he was their tenant, and the value of the premises during the defendant's occupation. The possession was not disputed, and there is no question depending upon the value. The tenancy is proved by the defendant's admission in the attornment that he held under the plaintiffs. The attornment was produced only for the purpose of establishing an acknowledgment of tenancy. It was not of itself an agreement to hold, or if it was an agreement, that agreement was collateral to the purpose for which the plaintiff sought to use the instrument. [*Bayley*, J.—Do not you use it to prove a surrender of the lease, and is it not evidence of an agreement to hold on terms hereafter to be fixed?] It was an absolute acknowledgment of a tenancy, and it lay upon the defendant to apply to the plaintiffs to define the terms. An unstamped instrument is admissible in evidence for collateral purposes, *Grey v. Smith* (a), *Rex v. Pendleton* (b), *Weldon*

(a) 1 Campb. 388.

(b) 15 East, 449.

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v. Matthews (a), Watkins v. Hewlett (b). So in *Drant v. Browne (c)*, where a proposal was made in writing to let land, which proposal was afterwards accepted by parol, it was held that the proposal was receivable in evidence without a stamp; so here, the attornment was merely a proposal to become tenant. It was evidence to prove that the defendant became tenant, and without a lease. It was not used to show an agreement, or as a memorandum of an agreement. [*Bayley, J.*—There is a material distinction between the effect of an attornment and of receiving possession. It was held in *Rogers v. Pitcher (d)*, that in the former case you may dispute your landlord's title, though in the latter you cannot. *Holroyd, J.*—This is not so much an attornment as a stipulation for a new tenancy; an attornment proceeds upon an old tenancy.] In *Childers v. Boulnois (e)*, the Court held that an I O U requires no stamp. [*Holroyd, J.*—A receipt stamp is only necessary where a discharge is given for a subsisting debt (*f*).] If the parties came to no agreement as to the terms of the holding, the defendant ought not to occupy the plaintiff's land without payment.

Manning, contra, referred to *Gravenor v. Woodhouse (g)*, in which the distinction laid down in *Rogers v. Pitcher* had been recognised and acted upon. (Here he was stopped by the Court.)

BAYLEY, J.—In every view of this case the plaintiffs are not entitled to recover. The defendant held under a lease granted by his father, against whom a sequestration after-

(a) 2 Chitt. Rep. 399.

(b) 1 Bro. & Bingh. 1; S. C. 3 J. B. Moore, 211. And see *Sutton v. Toomer, ante*, 125; *Mullett v. Hutchinson, ante*, 522, 7 B. & C. 639; *Langdon v. Wilson, ante*, 10, 7 B. & C. 640, n.

(c) 5 D. & R. 582.

(d) 6 Taunt. 203, 1 Marsh. 541, S. C.

(e) 1 Dowl. & Ryl. N. P. C. 8.

(f) *Tankins v. Ashby*, 6 B. & C. 541.

(g) 1 Bingh. 38, 7 J. B. Moore, 289, S. C.

wards issued. The defendant continued to hold under that lease, unless it be shewn to have been surrendered, or otherwise put an end to. The document produced in evidence does not refer to a by-gone bargain. "I do hereby attorn," must be understood to mean, I will be considered as now becoming tenant. The latter part of the agreement points to the terms of the new holding. It is said that this shews that the lease was no longer subsisting. The utmost that can be inferred is, that the defendant meant, that if he could have obtained better terms, he would have surrendered the subsisting lease; it does not imply that the lease had been put an end to. If this be an agreement, it requires a stamp. An attornment only puts the party in the same situation as the original landlord, and gives him no better right. If the landlord is entitled to possession, the party to whom the attornment is made is entitled to possession. By the manner in which these persons are described, you raise the strongest possible inference that they are not parties entitled to receive rent. If they had actual possession, they might have been entitled to receive rent from a party to whom they gave possession. *Rogers v. Pitcher*, and *Gravenor v. Woodhouse*, clearly shew the distinction between coming in under a party and attorning; attorning does not prevent your disputing the title. The want of a stamp is a sufficient ground for making this rule absolute. Besides which, the lease had never been put an end to.

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HOLROYD, J.—This action cannot be supported. This is not, technically speaking, an attornment. Sequestrators from the Court of Chancery take no estate. They receive money, to be applied as the Court shall direct. It is not a surrender, because sequestrators are not entitled to take a surrender. The lessee would, notwithstanding, remain bound to hold under the original landlord. The agreement also appears to be void for want of a consideration.

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In *Prouten v. Small* (a), it was held that a lease made by the landlord's attorney, in his own name, was void.

LITLEDAL, J.—I was disposed at the trial to think that this instrument required a stamp, and upon further consideration I am satisfied that it ought to have been stamped. It is not properly an attornment, but a new agreement, upon terms to be afterwards fixed; but it was evidence of a contract. Besides which, the lease would prevent the plaintiffs recovering in this form of action. This is not like the case of a tenant disputing his landlord's title. The plaintiff does not attorn to them as simple individuals. A surrender cannot be made to sequestrators; it must be to the lessor, or to a party legally entitled under him. And though the plaintiffs may bring a new action upon procuring the instrument to be stamped, that will not get rid of the objections.

Rule absolute to enter a nonsuit.

(a) 1 Stra. 705; 2 Lord Raym. 1418; and see *Berkeley v. Hardy*, 8 D. & R. 102; 5 B. & C. 356.

513 34.

PAYNE v. WILSON (b).

"A. having, at my request, consented to stay proceedings against B., I, C., do hereby, in consideration thereof, promise to pay 50*l.* on account, on the first day of April next,

and the further

sum of 53*l.* within four months next ensuing the first day of April." A declaration on this agreement, stating that in consideration that A., at the request of C., would consent to suspend proceedings against B., C. promised to pay to A. 30*l.*, &c., and that A. did suspend proceedings against B., discloses a sufficient consideration, avers a sufficient performance, and is supported by the terms of the agreement.

ASSUMPSIT. The declaration stated that *Vaux* had given a cognovit to the plaintiff for a debt of 103*l.*; and that *Vaux*, having made default in payment at the stipulated day of payment, plaintiff was about to take proceedings thereon against *Vaux*; and that thereupon, in consideration that the plaintiff, at the request of the defendant (c), would

(b) This and the following case were argued in Michaelmas term.

(c) The consideration being executory, the request seems to be immaterial.

*consent to suspend proceedings against Vaur, defendant undertook to pay the plaintiff 50*l.* on account of the debt, on the 1st day of April then next, and the further sum of 53*l.* within four months next ensuing the said 1st day of April; and that the plaintiff relying, &c. did suspend all further proceedings against Vaur on the cognovit, whereof defendant had notice. Plea, non assumpsit. At the trial, before Lord Tenterden, C. J., at the sittings at Westminster after Hilary term, 1827 (a), the following paper, signed by defendant, was given in evidence:—"Mr. R. Payne, having at my instance and request consented to suspend proceedings against the above-named defendant on the cognovit signed by him in this cause, and given for payment of the debt this day, I do hereby, in consideration thereof, personally undertake and promise to pay to the plaintiff the sum of 50*l.* on account of the said debt, on the 1st day of April now next, and the further sum of 53*l.* within four months next ensuing the 1st day of April." Upon this evidence it was contended that the plaintiff ought to be nonsuited on the ground that he had proved an *executed* consideration, whereas the consideration stated in the declaration was *executory*. The learned Judge overruled the objection, but gave defendant leave to move to enter a nonsuit. In the following term Campbell obtained a rule to enter a nonsuit on the point reserved, and also for arresting the judgment upon the insufficiency of the consideration and the allegation of its performance.*

Scarlett, A. G., and Wightman now shewed cause. The declaration discloses a sufficient consideration; *Boehm v. Campbell* (b), *Pace v. Marsh* (c). The request to suspend, stated in the declaration, is recited in the agreement, and is therefore evidenced by it.

(a) Counsel for the plaintiff, Scarlett and Wightman; for the defendant, Campbell.

(b) 3 J. B. Moore, 15; 8 Taunt. 679.

(c) 8 J. B. Moore, 59; 1 Bingh. 216.

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Campbell, contra. The distinction between executory and executed considerations is in fact a distinction between conditional and absolute promises. Here the declaration stated the consideration to be that plaintiff would consent, and the proof was that he had already consented. Then there are two objections in arrest of judgment; first, no sufficient consideration is stated in the declaration. The consideration alleged is, that plaintiff "would consent to suspend." This consideration might be performed by forbearing for an instant; but such a forbearance would be clearly insufficient as a consent; secondly, supposing the consent to be good, the declaration does not shew a performance. The allegation is, that the plaintiff "did suspend." It is not alleged that he consented to suspend. [*Littledale, J.* Actual suspension is greater than an agreement to suspend.]

Lord TENTERDEN, C. J.—I think the paper was evidence of the contract stated in the declaration. In arrest of judgment it is said that no sufficient consideration is shewn (a),

(a) It is not necessary that an executory consideration should be binding on the promisee; provided the liability of the promisor be made to depend upon the performance of the consideration, that performance may be optional on the part of the promisee. Thus in *Gardom, ex parte*, 15 Ves. 286, a guarantee was held to be binding in the following form:—"We agree and engage to guarantee for what twist *Thomas Tapp* may purchase from you from the 28th ult. to the 1st January, 1808," signed "*Hargreave Goodwin*." It is true that in the report of that case this broad ground of distinction between *ex parte Gardom* and *Wain v. Warlters*, (5 East, 10,) does not appear to have been adverted to; and on the contrary Lord *Eldon* is represented to have said, "Until

the case of *Wain v. Warlters* was cited some time ago, I had always taken the law to be clear, that if a man agreed in writing to pay the debt of another, it was not necessary that the consideration should appear upon the face of the writing. That case has determined two points; first, that a consideration is necessary; secondly, that it must appear upon the writing. It is excessively difficult to distinguish this from that case; as for this engagement to be answerable for any twist which the petitioners should supply to another person, there is no consideration unless, as it may be proved by parol evidence, that they did agree to furnish twist." But in *Stapp (or Stadt) v. Lill*, 2 Campb. 242, "I guarantee the payment of any goods which *J. S.*

but the consideration implies a promise to suspend pro-

delivers to *J. N.*," was held by Lord *Ellenborough* to contain a sufficient consideration, though no cross action would lie for the non-delivery of the goods; his lordship being of opinion that *when the delivery took place the consideration attached*; and the Court of K. B. were satisfied that the direction was right, 9 East, 349. S. P. admitted, *Warrington v. Furber*, 6 Esp. N. P. C. 89. In all these three cases this conditional or springing consideration appeared upon the instrument itself; the decision in them all seems therefore to be perfectly reconcilable to *Wain v. Warlters*, (confirmed by *Saunders v. Wakefield*, 4 B. & A. 595,) which merely decided that the consideration of the promise, as well as the promise itself, formed part of the agreement mentioned in the fourth section of the statute of frauds, and must be stated in the written instrument. The necessity for a consideration to support any promise not under seal had been previously established in *Rann v. Hughes*, 7 T. R. 350, n., 4 Bro. P. C. 27. In *Minet*, *ex parte*, 14 Ves. 190, a guarantee was given to this effect: "We promise to guarantee *Gurney* and Co. the repayment to them on one month's notice in writing of such sum or sums of money as they have already lent, or shall hereafter lend to *A. B.* not exceeding, &c., besides all legal interest." The parties who signed this instrument became bankrupts before any notice had been given; on which ground only the proof of debt upon the guarantee was ex-

punged. In that case Lord *Eldon* appears to have said, "With respect to the other point (in the Statute of Frauds) there is a variety of authorities contradicting the case (*Wain v. Warlters*) in the Court of King's Bench, which is a most important case with reference to its consequences; for the undertaking of one man for the debt of another does not require a consideration moving between them." If by this latter expression was meant that it is not necessary that the promisor should derive any advantage to himself from the consideration, it is not at variance with the decision in *Wain v. Warlters*, long before which it had been settled that risk, detriment, or inconvenience to the promisee was as good a consideration as benefit to the promisor. It appears, however, to be questionable whether the conditional or springing consideration in *Minet*, *ex parte*, would be sufficient to support that part of the promise which related to prior advances. It seems unreasonable to say that *Gurney* and Co. could have sued *Minet* for the amount of advances already made to *A. B.* although at the moment of accepting the guarantee they might have determined not to make any further advance.

The following note is appended to the case of *Gardom*, *ex parte*, in the first American edition of *Vesey*, junior:—"In New York it has been decided, that the consideration as well as the promise must be in writing. *Sears v. Brink*, 3 Johns. Rep. 210. But if

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ceedings until the 1st of April: After verdict (a) I think there is a sufficient allegation of performance.

BAYLEY, J.—I am of opinion that there is here no variance. Consent to suspend, means that he would suspend. The consent to suspend is, however, not binding (b). The agreement was, that he would suspend until the 1st of April, and after verdict it must be taken that he suspended the proceedings according to that agreement.

the promise be under seal, that of itself imports a consideration. *Livington v. Trampar*, 4 Johns. Rep. 416. And however sufficient the consideration, the promise must be in writing. *Jackson v. Rayner*, 12 Johns. Rep. 291. But where the guarantee or promise to pay the debt of another is made at the same time with the contract to which it is collateral, it is incorporated with the original transaction, and becomes an essential branch of it; the whole is one single bargain, and the want of consideration as between the plaintiff and the guaranteeing party cannot be alleged. *Leonard v. Vredenburg*, 8 Johns. Rep. 22, (2d edit.) and the cases cited in the reporter's note. *Wain v. Warlters*, 5 East Rep. 10, is recognized in *Sears v. Brink*, as having given a sound construction to the statute; but the authority of both those cases has been questioned by Chancellor *Kent*, 8 Johns. Rep. 29. Lord *Eldon*, in *ex parte Minet*, 14 Ves. jun. 490, expressed a decided opinion against *Wain v. Warlters*, saying, "there was a variety of cases directly contradicting it." Chief Justice *Pursons* and Chief Justice *Parker* have in effect overruled it, *Hunt v. Adams*, 5 Mass. Rep. 360, *Adams v. Bean*, 12 Mass.

Rep. 139; and Chief Justice *Smith* has stated the reasons for his unwillingness to consider the case as authority, in a very learned opinion, which is inserted in Mr. Day's edition of *East's Reps.* vol. 5, p. 20. In New Jersey, the Supreme Court have lately decided that it is not necessary that the consideration of a written undertaking to pay the debt of another should be expressed in or appear upon the alleged agreement. *Buckley v. Beardsley*, 2 South. Rep. 570. One of the Judges, however, dissented, upon the ground that the written memorandum did not contain as well the consideration as the promise. In Pennsylvania, the act of assembly "for prevention of frauds and perjuries," contains no provisions upon the subject of a promise or agreement to answer for the debt of another. In Virginia, the statute requires only that the promise should be in writing. *Violett v. Patton*, 5 Cranch, 142. The Court, however, said, their opinion in that case was not determined by the circumstance, there being a consideration expressed in the assignment."

(a) *Vide ante*, 285.

(b) See *Mann*. N. P. Digest. AGREEMENT, 1.—ASSUMPSIT, 1.—VARIANCE, 41.

LITLEDALE, J.—There is no variance here. There is a clear distinction between considerations executed and considerations executory. In Com. Dig. (Actions on the case upon assumpsit, B. 12,) it is said, "an assumpsit lies though the consideration is executed; as in consideration that he had done a thing at my request (a);" and afterwards, "so if the consideration is continuing, though the act be executed; as in consideration that the lessee now in possession had paid his rent very well, to save him harmless; for prompt payment of the rent is a continuing consideration when he remains in possession (b)." Now, if this be a continuing consideration, the plaintiff might in his declaration state the consideration to be either that he had suspended, or that he had consented to suspend. After verdict (c) it may be taken that plaintiff suspended absolutely or for a reasonable time. The allegation that the defendant suspended is stronger than that he consented to suspend.

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Rule discharged.

(a) Referring to 1 Roll. Abr. 13, line 35; 11, line 40.

(b) Referring to Cro. Eliz. 94; 1 Leon. 102.

(c) *Ante*, 285.

DOE on the Demise of Lord SUFFIELD v. PRESTON.

EJECTMENT for nine acres of land in Felmingham, Norfolk, tried before *Alexander, C. B.*, at the last Norwich assizes (a). By "an act for inclosing lands in the parishes of North Walsham and Felmingham, in the county of Norfolk", (b) certain commissioners were empowered to set

Commissioners are empowered by an inclosure act to award lands in exchange for other lands, provided such exchange be made with the consent of the respective owners; and

(a) Counsel for the plaintiff, *Storks, Serjt.*, and *Robinson*; for the defendant, *B. Andrews*.

(b) 48 Geo. 3, c. 43, (local and personal, not printed).

to award lands to persons who should agree to purchase the interest of any proprietor of lands directed to be enclosed. An award that *A.* shall receive certain lands from *B.* in exchange for certain lands of *A.*, and for 2,000*l.* to be paid by *A.* to *B.* is good, and requires no *ad valorem* stamp.

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out, allot, and award any lands, &c. within the parishes of North Walsham and Felmingham, or either of them, in lieu of or in *exchange* for any other lands, &c. within the said respective parishes or any adjoining parish, provided that all such exchanges were ascertained and specified in the award of the commissioners, and were made with the consent of the owner or owners of the lands so exchanged, and whether such owners should be seised in fee simple or fee tail, &c., and to make allotments to purchasers in cases where persons had sold or agreed to sell, or should, at any time before the execution of the award of the commissioners, sell or agree to sell their interest in the lands directed to be inclosed. The nine acres in question, and certain lands in the adjoining parish of Suffield, had originally belonged to the defendant, who, in November, 1813, after the passing of the act, agreed with the lessor of the plaintiff that the latter should have the defendant's lands in Felmingham and Suffield, and that he the defendant should have the lessor of the plaintiff's lands in Felmingham, and receive 2000*l.* after the commissioners should have made their award. The commissioners awarded the lands in question and the defendant's land in Suffield, to the lessor of the plaintiff, in exchange for his land in Felmingham and 2000*l.* It was objected on the part of the defendant, that the commissioners had no power of awarding any exchange, except of land for land of equal value, and that if the award were within the authority created by the act, it would amount to a sale *pro tanto*, and require an *ad valorem* stamp. These objections being overruled by the learned Judge, the plaintiff obtained a verdict.

Tindal, S. G., now moved for a new trial, and renewed the two objections taken at the trial. The commissioners exceeded their authority. The act authorizes an exchange where the parties have a less estate than a fee, and enables such parties to borrow money upon the fee, but it goes no further. The authority is "to sell the lands directed to

be inclosed." If the award conveys a title to the land, it ought to be properly stamped. [Lord Tenterden, C. J. I know of no instance of putting an *ad valorem* stamp upon an award. *Bayley, J.* Was the agreement stamped?] The plaintiff did not rely upon the agreement. The Lord Chief Baron said, that it did not lie in the mouth of the defendant to make the objection, though an heir might. [*Bayley, J.* The *ad valorem* stamp is imposed by statute on the conveyance.]

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Lord TENTERDEN, C. J.—There is no weight in either objection. The commissioners had authority to award land in exchange for land, or, in the case of a sale, for money. Here they have awarded land partly for land and partly for money. An award stamp was sufficient.

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8. Assignees cannot at first adopt the act of a creditor interfering with the bankrupt's effects as creating a contract, and afterwards disaffirm it as a tort; although such act, if disaffirmed by them in the first instance, would have amounted to a wrongful conversion of the bankrupt's goods. *Brewer v. Sparrow*, *M. 8 G. 4.* 2
9. Nor can they affirm the same transaction in one part as a contract, and disaffirm it in another as a tort. *ibid.*
10. Assignees may affirm the acts of a person interfering with the bankrupt's estate, even though his acts would amount to a conversion of the effects, if they had not thought fit to waive the tort and treat the party as their agent. *ibid.*

11. In an action by assignees, if the defendant do not give notice to dispute the trading, &c., under 6 G. 4, c. 16, s. 90, he ought not to be permitted to disprove the trading, *scmble. Bernasconi v. Lord Glengall*, *M. 8 G. 4.* page 326

BARGAIN AND SALE.

I. *Of a freehold.*

1. How pleaded. 285 (a)

BARON AND FEME.

I. *Marital rights.*

1. A contract of hiring and service entered into by a married woman is defeasible at any moment by the husband. 169, 170

II. *Parochial settlement of wife.*

- See PAUPER, 1.—SETTLEMENT, 4, 5.
—TRESPASS, 1.

III. *Plea of coverture.*

See ABATEMENT, 2.

IV. *Validity of marriage.*

See EVIDENCE, 2, 3.

BILL OF COSTS.

See ATTORNEY, II.

BILL IN EQUITY.

See DEVISE, 6.—EVIDENCE, 6.

BILL OF EXCEPTIONS.

I. *In criminal cases.*

1. First denied upon a trial for high treason in *Sir Henry Vane's case*. 280

II. *In civil cases.*

See BANKRUPT, 3.

BILL OF LADING.

I. *Title of indorsee.*

1. Parol evidence of title acquired by indorsement of bill of lading. 447

BILL OF MIDDLESEX.

See PRACTICE, 1.

BILLS AND NOTES.

See LIEN, 3.—PARTNERS, 2.—POWER OF ATTORNEY.—SURETY, 1.

I. Notice of dishonour.

1. *A. B.* draws a bill at 30 days' sight on *A. B.*:—The drawer is not entitled to notice of non-acceptance. *Roach v. Ostler, M. 8 G. 4. page 120*
2. Where *A. B.* draws on *A. B.*, a letter written by *A. B.* the drawer to the payee, expressing his apprehension that the bill would be dishonoured, coupled with the fact, that the place to which the bill is directed is the usual residence of the drawer when in England, is evidence from which the identity of the drawer and the drawee may be inferred. *ibid.*

II. Waiver of laches.

3. Laches of holder not waived by a promise of payment made in ignorance of such laches. 123 (b)

III. Stamp.

4. *A.*, the acceptor of bills for 25*l.* and 50*l.*, both over due, pays 22*l.* 10*s.* to *B.*, the holder, "on account." *B.* says, "I wish to have the full amount of the 25*l.* bill." *A.* replies, "I have no more money now, but will pay some more soon." *B.* then indorses on the 25*l.* bill, "received 22*l.* 10*s.* in part of two bills." *B.* may appropriate the payment to the 25*l.* bill, though void for want of a stamp. *Biggs v. Dwight, M. 8 G. 4. 308*
And see *infra*, 15, 16

IV. Acceptance *supra protest*.

5. Where *B.* accepts a bill for the honour of the drawer, on the refusal of *A.*, the drawee, it must be presented again to *A.* for payment at maturity, before *B.* can be charged on his acceptance. *Williams v. Germaine the elder, M. 8 G. 4. 394*
6. Even in the case of a bill payable after sight. *Ibid.*
7. But in foreign countries the acceptor *supra protest* is considered as

standing in precisely the same situation as an accepting drawee.

page 395 (a), 398 (a), 399 (a)

8. A bill accepted for the honour of the drawer, on the refusal of the drawee, must be presented to the drawee at maturity, before the drawer can be charged. *Williams v. Germaine the younger, M. 8 G. 4. 403*
9. A presentment to the acceptor for honour only is not sufficient. *ibid.*
10. Holder not bound to acquiesce in acceptance for honour. 404
11. Nor to receive the principal from the drawee without the expenses of the protest. *Semble.* 399 (d)
12. As to the nature of the liability of an acceptor *supra protest*, see 398 (a)

V. Protest.

13. Omission of averment of protest, ground of special demurrer. 401, 403 (b)

VI. Accommodation bill.

14. As to the period at which an accommodation bill creates a contract, see 316 (b)

VII. Alteration.

15. As to alteration in date, see *ibid.*

VIII. Banker's deposit note.

16. A banker's deposit note, "payable at 10 days' sight, with 3 per cent. interest until the day of acceptance." need not be left for acceptance. *Sutton v. Toomer, M. 8 G. 4. 125*
17. "Acceptance" in such an instrument means "demand." *ibid.*

BIRMINGHAM COURT OF REQUESTS.

See *Cornforth v. Lowcock, M. 8 G. 4. 323.*

BONA NOTABILIA.

1. What shall be. 530, 531, 532

BOND.

See PLEADING, 9, 10.—VARIANCE, 1.
I. Surety bond.

1. Obligor of bond conditioned for the faithful service of *A.* while in the employ of *B.*, not discharged by

giving notice that after a certain period he will be no longer answerable. *Semble, Calvert v. Gordon, M. 8 G. 4.* page 497

2. Nor can the personal representative of the obligor so discharge himself. *Semble. ibid.*

And see PLEADING, 11.

II. *Arbitration bond.*
See ARBITRAMENT, IV.

III. *For the performance of covenants.*

3. After judgment in an action of debt on bond, it is no plea to say that the bond was conditioned for the performance of covenants, and that no breaches were assigned or suggested in the first action. *Anon. M. 1 & 2 G. 4.* 496 (a)

BOUNDARY.

I. *Presumption as to the boundary line.*

1. Where land, abutting on a ditch and a lane, on each side belongs to different owners, the presumption is, that the hedge and ditch on one side belong to the occupier of the land on that side. 65
2. But no such presumption arises where the land on both sides belonging to the same owner, he demises to different tenants. *ibid.*
3. And if such owner demise the lane jointly to the respective tenants, they become tenants in common of the lane. *ibid.*
4. The owners of two adjoining houses separated by a wall, are presumed to be tenants in common of that wall, and not as seised in severalty *usque ad medium filum.* *Wiltshire v. Suford, M. 8 G. 4.* 404

II. *Destruction of boundaries.*

5. And in the absence of evidence of such seisin in severalty, no action can be maintained by the occupier of one house against the occupier of the other, for pulling down the wall. *ibid.*

BURGESS.

See ALDERMAN, 1.—CHARTER, 1, 2, 5.—CORPORATION, 1, 12, 16.

CERTIFICATE.

CANAL.

See MANDAMUS, 1.—RATES, 1.

CAPIAS AD RESPONDENDUM.

See ATTORNEY, 12.—PRACTICE, 3, 4.

CARRIAGES:

See LIEN.

CERTIFICATE.

I. *Bankrupt's.*

See BANKRUPT, 6.

1. After the first day of term, a commission of bankrupt issues against *A.* In the course of the same term *B.* signs judgment against *A.* in trover: the judgment is a debt provable under the commission, and *A.*'s certificate is a bar to a *sci. fa.* *Greenway v. Fisher, M. 8 G. 4.* 330

II. *Game.*

See CERTIORARI, 1.

III. *Parish.*

2. A certificate purporting to be granted to a pauper and his family, by four persons, as churchwardens and overseers, is signed by two overseers and one churchwarden: this is an execution by the major part of the overseers and churchwardens within 8 & 9 W. 3, c. 30. *Res v. Whitchurch, M. 8 G. 4.* 472
3. Where such a certificate was given in 1758, and it appeared that the signing churchwarden was nominated at Easter, and sworn in September, the usual time for swearing churchwardens, and there was no proof of his having been sworn when he signed the certificate, and the parish relieved the pauper and his family in another parish, at various times from 1758 to 1827:—The Court presumed that the churchwarden was sworn before he signed the certificate, and held the certificate good. *Res v. Whitchurch, M. 8 G. 4.* 472
4. Jurisdiction of magistrates must appear on face of certificate. 668
5. Whether the execution of a certificate by a churchwarden who has

CHARTER.

not been sworn in, would be good,
quare. page 472

IV. Of ship's register.

6. How proved. 447

CERTIORARI.

I. Where grantable.

1. The Court will not grant a *certiorari* to remove a conviction under 52 Geo. 3, c. 93, for using a dog and gun without a certificate, on the ground that jurisdiction does not appear on the face of the conviction, without an affidavit, negating the jurisdiction. *Rex v. Long*, M. 8 G. 4. 139

II. Bail on.

See *PROCEDENDO*, 1.

CHARTER.

See *CORPORATION*.—*QUO WARRANTO*.

I. Acceptance of.

1. By a new charter a corporation, formerly consisting of a mayor and burgesses, was made to consist of a mayor, aldermen, chief burgesses, and burgesses; the three former to constitute the common council. The common council and a majority of the burgesses expressed their assent to the new charter, some by voting at an election held under it, and others by a written declaration:—Held, that this was a sufficient acceptance of the new charter. *Rex v. Hughes*, H. 8 & 9 G. 4. 625
2. *Quare*, whether a majority of the burgesses need have concurred in such acceptance. *ibid*.
3. The acceptance of a charter is generally proved by evidence of acting under it. 636
4. Whether an acceptance of a charter is necessary, *quare*. 637
5. *Semhle*, that acceptance of a charter by a reasonable number of the burgesses would be sufficient. *ibid*.
6. Any unequivocal act of the parties, expressive of their desire to accept the charter and to be governed by it, is a sufficient acceptance. 640

COMMITMENT. 725

CHARTER-PARTY.

See *INSURANCE*, 1.

CHIEF BURGESSES COUN- CILLORS.

1. A select body in a corporation, designated as *chief burgesses councillors*, not necessarily aldermen. *Rex v. Headley*, H. 8 & 9 G. 4. page 345

CHURCHWARDENS.

See *CERTIFICATE*, III.—*OVERSEERS*.
—*SELECT VESTRY*.

CLERK.

See *BOND*, 1, 2.

COMMENDAM.

See *QUARE IMPEDIT*, 1.

COMMISSIONERS OF BANK- RUPT.

See *BANKRUPT*, VI. VII.

COMMISSIONERS OF INCLO- SURE.

See *INCLOSURE ACTS*.

COMMITMENT.

See *ATTORNEY*, 12.

I. Form of warrant.

1. The warrant must specify the cause of commitment. 622 (f)
2. Proper mode of describing cause of commitment. *ibid*.
3. On a question upon the legality of the commitment of a witness by commissioners of bankrupt, all the questions and answers must be looked at as forming one examination; and a witness cannot be committed for not answering as to his belief as to the intention of the bankrupt, unless other parts of his examination shew such belief to be material with reference to the person, trade, dealing, or estate of the bankrupt. *Ex parte Bagster*, H. 8 & 9 G. 4. 572
4. A warrant of commitment by one justice, under 39 & 40 Geo. 3, c. 94, s. 3, stating that "A. had been discovered and apprehended under circumstances that denoted a derange-

ment of mind, and a purpose of committing a crime (that is to say, an assault and breach of the peace), for which, if committed, he would be liable to be indicted, and that it appeared to the justice that he ought to issue a warrant for committing him as a dangerous person, suspected to be insane," sufficiently "expresses the *cause* of commitment," within the meaning of the statute. *Ex parte Gourlay*, *H. 8 & 9 G. 4.*

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COMMITTITUR.

See ESCAPE, 1.

COMPETENCY.

See EVIDENCE, 4.—WITNESS, 1.

CONDITION.

1. In a lease not under seal, and signed only by the lessee, it is "stipulated and conditioned," that the lessee shall not underlet. These words, without an express clause of re-entry, make the estate voidable by the lessor. *Doe v. Watt*, *H. 8 & 9 G. 4.*

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CONSENT.

I. Of creditors.

See INSOLVENT DEBTOR, 2, 3, 4.

II. Of parents.

1. By whom to be proved. 683, 685

CONSIDERATION.

See PLEADING, I.

CONSTABLE.

I. Presentments by.

1. What offences a constable may present. 274 (d)
2. A constable may present upon his own knowledge. *Rex v. Justices of Somersetshire*, *H. 8 & 9 G. 4.* 272
3. But this presentment must be made upon oath. *ibid.*
4. So, if he go before a grand jury. *ibid.*

CONTRACT.

See AGREEMENT.

CORPORATION.

CONTRIBUTION.

See GENERAL AVERAGE.—JOINT STOCK COMPANIES.

CONVICT.

See SETTLEMENT, 5.

CONVICTION.

See DISTRESS, II.—JUSTICES, 1, 2.—TRESPASS, 2, 3.

I. Where formal.

See CERTIORARI, 1.

COPY OF INDICTMENT.

1. Upon the trial of an action for a malicious prosecution a copy of the indictment will be received in evidence, in whatever manner it may have been obtained. *Caddy v. Barlow*, *M. 8 G. 4.* 276
2. As to the right of the subject to inspect and obtain copies of indictments and other public records, see 279 (a)

COPYHOLD.

See SETTLEMENT, 6.

CORPORATION.

I. Election to corporate offices.

See CHARTER.—QUO WARRANTO, 1.

1. A charter granted to a corporation by prescription, recognizes the existence of a body consisting of thirty-six chief burgesses, and directs that the mayor, recorder, "and the chief burgesses, being the common council of the said borough, of which chief burgesses some are called, known, or distinguished, by the name and distinction of chief burgesses councillors, of the borough aforesaid, or the greater part of them, shall have power and authority to choose, nominate, and appoint, a mayor, &c.," and the mayor is to be chosen out of the chief burgesses councillors. It creates a court of record within the borough, which is to be held before the mayor, recorder, and the chief burgesses councillors, before whom also the sessions of the peace are appointed to be held, out of whom the justices for the borough are to be chosen, and by whom

- finer are to be imposed on persons refusing to take upon themselves offices to which they are elected. When the common council are assembled in their elective capacity, it is sufficient if any nineteen chief burgesses are present; and it is not necessary that the presence of a majority of the twelve chief-burgesses-councillors, and the presence of a majority of the twenty-four chief burgesses not being councillors, should concur. *Rex v. Headley*, *M. 8 G. 4.* page 345
2. There may be a good elective assembly of a select body in a corporation, without notice of the purpose of the meeting being previously given. *Rex v. Chetwynd*, *H. 8 & 9 G. 4.* 534
 3. As where every member is present, and all agree to proceed to an election. 538, 538 (a)
 4. So, where it is usual to proceed to an election after notice to every member to attend a meeting without intimating the purpose of the meeting. 538
 5. As to sufficiency of notice, see 542 (a)
 6. Where a right of election is given by charter to persons, describing them in their corporate character, every member within that description must be present at the time of election. *Rex v. Headley*, *H. 8 & 9 G. 4.* 345, 383
 7. And in the case of definite bodies, a majority of each definite body must be present at the election. *ibid.* 541 (a)
 8. Where a reasonable doubt arises as to the right of election to corporate offices, the Court will grant a *quo warranto*. 387
 9. What shall be sufficient notice of a meeting for the purpose of an election. 541, 542 (a)

II. Title to freedom.

10. An attorney is not as such a trader, nor is his articled clerk an apprentice, so as to entitle the latter to the

freedom of a corporation as by apprenticeship to a freeman, being a trader. *Rex v. Doncaster*, *H. 8 & 9 G. 4.* page 545

III. Relator.

11. An inhabitant subject to the jurisdiction of the corporate officers is a competent relator in a *quo warranto* information. *Rex v. Headley*, *H. 8 & 9 G. 4.* 350, 358, 364
12. So any burgess. *Rex v. Davis*, *H. 8 & 9 G. 4.* 538
13. Although the right of election be in a select body. *ibid.*

IV. Disclaimer of office.

14. Entry of disclaimer on *quo warranto* informations. 387 (a)

V. Re-election.

15. The appointment of an officer by a new charter to an office which he had held under the old charter within the time within which a re-election is prohibited by 9 *Ann. c. 10, s. 8*, does not bring the party within the operation of that statute. 634, 635, 637

VI. Town Clerk.

16. A town clerk is a ministerial officer in whom all the burgesses have an interest. 545

COSTS.

I. Interlocutory.

1. Costs of shewing cause against a rule in the first instance are never given. *Rex v. Long*, *M. 8 G. 4.* 139
2. Costs imposed upon a party who obtains a rule *nisi* upon affidavits not fairly and fully disclosing the facts of the case. 638

II. Final.

And see ATTORNEY, 1, 4, 5.

3. In an action for a debt recoverable in a Court of Requests, where the plaintiff might, after verdict, be deprived of costs, this court will stay the proceedings on payment of the debt without costs. *Cornforth v. Lowcock*, *M. 8 G. 4.* 321

728 COUNTY COURT.

4. Where the expenses of an indictment for a misdemeanour are wholly defrayed by subscription, the nominal prosecutors are not entitled to costs within 5 *W. & M. c. 11, s. 3. Rex v. Cooke, H. 8 & 9 G. 4.*

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5. Whether the near relations of a person whose body has been disinterred for the purposes of dissection, are parties grieved within that statute, *quæra. ibid.*

6. After judgment by default and writ of inquiry executed, the defendant cannot enter a suggestion under the Middlesex County Court Act, 23 G. 2, c. 33, to deprive the plaintiff of costs. *Strutton v. Whitwell, H. 8 & 9 G. 4.* 562

7. Under the St. Alban's Court of Requests Act, the defendant must plead his residency within the liberty; and if he omit to do so, he will not be allowed to enter a suggestion to deprive the plaintiff of his costs, where the verdict is under 40s. *Anstee v. Liley, H. 8 & 9 G. 4.* 564

8. In *scire facias*, see 490 (a)

9. In *ejectment*, see *EJECTMENT*, 2.

III. As between attorney and client.

10. In trespass for entry, expulsion, and mesne profits, plaintiff may recover the costs of the reversal of a judgment in ejectment for defendant, as between attorney and client. *Nowell v. Roake, M. 8 G. 4.* 170

IV. Double costs.

See 562, 564

COUNTERPART.

See 297 (b)

COUNTY COURT.

See Costs, 6.

I. Jurisdiction of.

1. Where county court has exclusive jurisdiction. 323 n.
2. Prohibition to county court after judgment, where it has no jurisdiction. *ibid.*

DAMAGES.

COURT OF REQUESTS.

See Costs, 3, 7.

I. Jurisdiction of.

1. When necessary to be pleaded. *Anstee v. Liley, H. 8 & 9 G. 4.* page 564

COVENANT.

I. Construction of.

1. In a lease described as subject to a net yearly rent, a covenant on the part of the tenant to pay sewers' rates and land tax is to be regarded as a common and usual covenant. *Bennett v. Womack, H. 8 & 9 G. 4.* 644

And see PRACTICE, 7.

II. What are usual covenants.

See AGREEMENT, 2, 3.

COVERTURE.

See ABATEMENT, 2.

CREW.

See INSURANCE, 2, 3.

CRIMINAL INFORMATION.

See MALICIOUS PROSECUTION, 1.

CUSTOM.

1. What, valid.

See SELECT VESTRY, 1.

CUSTOMARY FREEHOLDS.

1. As to the nature of this tenure, see 269 (c)

DAMAGES.

I. Principles of assessing.

1. In aggravation of damages in an action by A. for a malicious prosecution of an indictment against A. and B., evidence may be given of the misconduct of the defendant towards B. after his apprehension, to shew malice. *Caddy v. Barlow, M. 8 G. 4.* 275
2. No new trial for excessive damages in such action. *ibid.*
3. Measure of damages in action for not replacing stock at the day stipulated. 491 (a)

DEEDS.

DEAD BODIES.

1. Costs to prosecutors of indictments for disinterring dead bodies, where allowed. *Rex v. Cooke, H. 8 & 9 G. 4.* page 526

DEBT, ACTION OF.

I. Upon matter of record.

See the concurrent remedy by SCIRE FACIAS.

1. To a declaration on a judgment in debt on bond, the defendant cannot plead that the bond was conditioned for the performance of covenants, and that no breaches were assigned or suggested. 496 (a)

II. In the reality.

2. Debt for rent will lie against a party who, having agreed for a lease at a certain rent, has entered and paid rent according to the terms of the intended lease. 138

III. Upon other specialties.

See ARBITRAMENT.—BOND.—DE-
VICE.—HEIR.

IV. On simple contract.

See ACCOUNT, 3, 4.—AMERCIA-
MENT, 1.—ARBITRAMENT, 1, 2.

DEBTOR AND CREDITOR.

See DEVISE, III.—INTEREST, 1.

1. Whether a debtor can require his creditor to receive the debt before the stipulated day of payment, *quære*. 153, 154
(See this point discussed, *POTHIER, OBLIGATIONS, No. 233.*)
2. As to the application of payments, see *Biggs v. Dwight, M. 8 G. 4.* 308, 311 (a)

DEEDS.

See ATTORNEY, 9, 10.—PARTNERS, 1.
—STAMPS, 1.—SURETIES, 1.

I. To whom they belong.

1. Deeds creating a particular estate belong to reversioner after particular estate determined. 297 (b)

DEPOSIT NOTE. 729

2. So grant of next presentation, when served, belongs to owner of advowson. page 297 (b)

See ATTORNEY, 9.

II. Profert of, when necessary.

3. But as the owner of the advowson does not claim under the grant, he need not make profert of it, though, in order to launch his title in *quare impedit*, he alleges the grant, and a presentation under it as made in his right. *ibid.*

III. Construction of.

See BOND, 1.—DEVISE, 1.

IV. How proved.

See EVIDENCE, 10.

V. Operation of.

See GRANT, 1.

DEER.

I. Coursing.

1. Evidence upon indictment for. 685

DEFAMATION.

See LIBEL.

DEMAND.

I. Where necessary.

See AFFIDAVIT, 1.—ARBITRAMENT, 1.

DEMISE.

See LEASE

DEMURRER.

See PLEADING, 9, 11.

I. General.

1. As to the propriety of raising questions for the opinion of the Court by demurrer, see 537

II. Special.

See BILLS AND NOTES, 14.—PLEAD-
ING, 9, and see page 496.

DEPOSIT.

See AUCTIONEER, 1, 2.

DEPOSIT NOTE.

See ACCEPTANCE, 1.—EVIDENCE, 3.

DEPOSITIONS.

See EVIDENCE, 7.

DEVISE.

I. *What estate devisee shall take.*

1. Upon a devise of lands in trust to educate the son of the devisor until twenty-one, provided, that if the wife of the devisor should be living when his son attained twenty-one, the devisee should retain and hold in trust so much as would secure to his wife 30*l.* per annum; the wife of the devisor having died in his life time:—Held, that the devisee took a chattel interest only. *Morant v. Gough*, M. 8 G. 4. page 41

II. *Liability of devisee.*

2. The obligor of a bond, *without penalty*, for the "payment to A. M. during her life of 20*l.* a year, bequeathed to his wife 30*l.* a year for her life, and devised to defendant all his freehold messuages, &c. in trust to educate his son until twenty-one, and to account for profits at that time; provided, that if his wife should be living when his son attained full age, the devisee should retain and hold, in trust, such of his estates as would secure to his wife the said 30*l.* a year." Testator's wife died during his lifetime, and testator afterwards died leaving his son surviving, who afterwards died under age:—Held, that the estate of the devisee ceased on the death of testator's son; and that the devisee was not liable to A. M. for any arrears of her annuity which had accrued since his death, although the rents and profits exceeded the annuity. *Morant v. Gough*, M. 8 G. 4. 41

III. *Remedy of creditors against devisee.*

3. Under what circumstances a creditor shall have general judgment, and immediate execution against the devisee of the debtor, see 48, n.

DOWER.

4. Action of covenant will not lie against devisee of covenantor.

page 48, n.

5. So voucher, writ of annuity, and writ of *warrantia chartæ*, semble.

ibid.

6. As to remedy against devisee of covenantor in equity, see *ibid.*

DISCLAIMER.

I. *Of tenancy.*

See EJECTMENT, 1.—GRANT, 2.

II. *Of office.*

See CORPORATION, IV.

DISCOUNT.

1. Excessive discount not usury, where the advance is made and the discount exacted by the party ultimately liable. 151 (b)

DISCRETION.

See INCLOSURE ACT, 1.

DISINTERMENT.

1. Costs of prosecution of indictment for, where allowed. 526

DISSEISIN.

See

221 (c)

DISTRESS.

I. *For rent.*

1. Since 8 Anne, c. 14, (sect. 6, 7,) a distress no affirmance of the existence of a tenancy at time of distress made. 210 (a)

II. *In execution upon a conviction.*

See JUSTICES, 1.

DISTRIBUTIVE SHARE.

See EXECUTOR, 1.

DOGS.

See CERTIORARI, 1.—TRESPASS, 2.

DOWER.

I. *Title.*

1. What a sufficient seisin in the husband. 221 (c)

ENTRY.

DRAFTS OF LEGAL INSTRUMENT.

See ATTORNEY, 9.

DUPLICITY.

See PLEADING, 9.

EASEMENT.

See BOUNDARY, 4.

EAT INDE SINE DIE.

See 172 (b)

EJECTMENT.

I. Title of lessor.

See CONDITION, 1.—ENTRY, 1, 3.—EVIDENCE, 14, 15.—GRANT, 1.—LEASE, 2, 4.

1. *A.* by deed "demised, leased, granted, assigned, transferred, set over, directed, limited, and appointed, to *B.* the moiety of certain lands," in the possession of *A.* and *C.*, *habendum* to *B.* during the life of *A.* No livery of seisin was made. *C.* was, at the date of the deed, tenant from year to year to *A.* of part of the lands:—Held, that an estate for the life of *A.* passed to *B.*, who was entitled to recover in ejectment against *C.* upon the determination of *A.*'s estate by notice or disclaimer.
Doe v. Cole, *M.* 8 G. 4. 33

II. Costs in.

2. A plaintiff is entitled to the costs of the writ of possession. 176

And see COSTS, 9.

ELECTION.

See CORPORATION.—INFANT.

EMANCIPATION.

I. When complete.

See SETTLEMENT, 8.

ENTRY.

I. Rightful.

1. A party entitled to bring ejectment may peaceably enter without suit. 221 (c)

ESTATE.

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2. Going upon the land and using it by a party entitled to the possession is an entry, although nothing be said. page 221

3. After entry the party is remitted to his possession with relation to the period at which his title accrued 221 (c)

II. Wrongful.

See COSTS, 8.—TRESPASS, 4.

EQUITY.

See DEVISE, 6.—EVIDENCE, 6.

ERROR.

See AUDITA QUERELA, 1.—BANKRUPT, 3.

I. Where a stay of execution.

1. Allowance of a writ of error is no stay of execution, where sham bail is put in. *Bradley v. Gompertz*, *H.* 8 & 9 G. 4. 567

II. At what period record removed.

2. Where the issue is upon the traverse of an allegation, that after the giving of judgment in *C. P.* the record was brought into *K. B.* by writ of error, it is sufficient to prove that the transcript was brought into *K. B.* after taxation of costs in *C. P.* *Nowell v. Roake*, *M.* 8 G. 4. 175

ESCAPE.

I. Action for escape in execution.

1. In an action against the marshal for an escape, the plaintiff is entitled to an inspection of the *habeas corpus* and *committitur* before he declares. *Fox v. Jones*, *H.* 8 & 9 G. 4. 570
2. *Secus*, in *C. P.*, in actions against the warden. 572 (b)

ESTATE.

I. Tenancy from year to year.

See EJECTMENT 1.—SETTLEMENT, 4.

1. Where a party is let into possession under an agreement for a lease and has paid the stipulated rent, a tenancy from year to year is created. *Doe v. Smith*, M. 8 G. 4.

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II. *Estate tail.*

See

297 (b)

III. *Copyhold.*

See SETTLEMENT, 5.

IV. *Customary freehold.*

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269 (c)

V. *Joint tenancy.*

See SETTLEMENT, 5.

2. Authority of joint tenants of a farm to bind each other. 640

VI. *Tenancy in common.*

See EVIDENCE, 5.—SETTLEMENT, 5.—TRESPASS, 5.

3. Upon a lease by tenants in common the survivor may sue for the whole rent; although the reservation be to the lessors according to their respective interests. *Wallace v. M' Laren*, H. 8 & 9 G. 4. 516

ESTOPPEL.

See LANDLORD AND TENANT, 1.

EVIDENCE.

See COMMITMENT, 3.—ESCAPE, 1; 2.—PRACTICE, 2.

I. *Onus probandi.*

See CERTIORARI, 1, and see 419

1. Where the interest of any person rests upon an affirmative, it is for him to prove the affirmative. *Semble*. 244
2. Where, in ejectment, the plaintiff relies on the invalidity of a second marriage, by reason of a former marriage by licence, one of the parties being a minor, and the defendant has notice that the question intended to be raised is, whether the first marriage was with the consent of the minor's parent, it lies upon him to disprove such consent. *Doe v. Price*, H. 8 & 9 G. 4. 683

3. The Court will not grant a new trial to let in evidence negating such consent, where that evidence might have been produced at the trial. page 683

4. It is upon the party who objects to the competency of a witness to prove his incompetency. 672

II. *Admissible.*

5. Where, in trespass *quare clauum fregit*, it appeared that plaintiff and defendant, respectively, occupied lands under the same landlord, and abutting on different sides of a lane; and that defendant held under a lease, not produced:—Held, that the evidence of the landlord, stating "that he had let the lane jointly to plaintiff and defendant, as much to one as to the other," was properly received. *Noye v. Reed*, M. 8 G. 4. 63

6. Bill in equity cannot be read against a party not claiming under plaintiff or defendant, in the equity suit. 667

7. Nor depositions. *ibid.*

8. In an action by A. for the malicious prosecution by C. of an indictment against A. and B., evidence of the misconduct of C. towards B., after his apprehension, tending to shew the bad motives of C., is admissible. *Caddy v. Barlow*, M. 8 G. 4. 275

9. A copy of the indictment, though granted to B. only, is also admissible; and the Court will not entertain the question of its having been fraudulently obtained. *ibid.*

10. Proof by an apprentice that when his apprenticeship expired he asked his master for the indenture, who said it was with the overseers of the parish; and that their successors had searched for the indenture, but could not find it; is not sufficient to let in parol evidence of the contents of the indenture, the master being alive and not subpoenaed. *Ree v. Denton*, M. 8 G. 4. 295

M. Parol evidence of the fact of the pauper's having been tenant of premises in the respondent parish, is admissible on the part of the appellant parish, though he held under a written agreement not produced. *Res v. Hull*, M. 8 G. 4. page 444

12. The examination of a soldier under the Mutiny Act, as to his settlement, is not admissible in evidence, unless it appear that the ex-aminant was quartered in a district in which the examining magistrates had jurisdiction. *Res v. All Saints*, H. 8 & 9 G. 4. 663

13. *A.* deposits money with *B.* a banker, on the terms of having a deposit note, by which *B.* shall engage to pay the principal, at ten days' sight, with 3 per cent. interest, until the day of acceptance. A note is given accordingly. On receiving interest on the note, *A.* is told that *B.* cannot afford to pay more than 2½ per cent. in future, and "3" is struck out, and "2½" inserted instead:—Held, that the payment of interest is evidence to shew that a principal sum corresponding with, and bearing such interest, was due; and that the note, though void, may be looked at to see the terms on which the deposit was made. *Sutton v. Toomer*, M. 8 G. 4. 125

14. As to the admissibility of a judgment in an action of ejectment in evidence against the lessee of the nominal plaintiff in ejectment, see 172 (a)

15. Terms imposed of not giving a judgment in evidence. 689

And see STAMP VII.

III. Presumptive.

See INTEREST, 2.

16. *A. B.* draws a bill at 30 days' sight on *A. B.*:—Held, that a letter written by *A. B.* the drawer, to the payee of the bill, expressing his apprehension that it would be dishonoured, coupled with the fact,

that the place to which the bill is directed is the usual residence of *A. B.* the drawer, is evidence from which a jury may infer the identity of drawer and drawee. *Roach v. Ostler*, M. 8 G. 4. page 120

IV. Sufficiency of, upon particular issues.

And see AGREEMENT, 4.—ATTORNEY, 5.

17. Where upon pleadings in trespass *quare clausum fregit*, an issue is taken upon an allegation that after the giving of judgment in C. P. the record was removed by writ of error into K. B.: it is sufficient, in support of the affirmative of the issue, to produce the return to the writ of error, purporting that the transcript was brought into this Court after the taxation of costs in C. P. *Nowell v. Roake*, M. 8 G. 4. 170

18. In debt by *A.* and *B.* against *C.* on an award where the submission was by *A.* and his wife, and *B.*, on the one side, and by *C.* and *D.* jointly and severally, on the other, the execution of the submission by the wife of *A.*, by *B.*, and by *D.*, must be proved. *Ferrer v. Owen*, M. 8 G. 4. 222

19. *Semble*, that a compulsory admission of a debt extracted from the defendant, on his examination before commissioners of bankrupt, is not evidence of an account stated. *Tucker v. Barrow*, H. 8 & 9 G. 4. 518

And see LIEN, 2.

V. Competency of witnesses.

Vide supra, 4.—WITNESS, 1.

VI. Admissions.

Vide supra, 19.—INTEREST, 2.—PARTNER, 1.—RELIEF, 1.—SETTLEMENT, 3.

VII. Secondary evidence.

Vide supra, 10, 11.

EXCHANGE OF LAND.

See INCLOSURE ACT, 1.

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EXECUTION.

See ERROR, 1.—FIERI FACIAS.

1. When to be made returnable.
page 319 (a)

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See AGREEMENT, 1.—MANDAMUS, 1.

I. Actions against.

1. Assumpsit does not lie for the amount of the plaintiff's distributive share of the personal estate of an intestate, admitted by an administrator to be in his hands. *Jones v. Tanner*, M. 8 G. 4. 420
2. *A fortiori*, it will not lie against the executor of such administrator, upon an admission made by the former. *ibid.*

And see PLEADING, 1.

EXPRESSIO EORUM QUÆ TACITE INSUNT.

See 211, 211 (b)

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I. Immediate.

See 319 (a)

FACULTY.

I. Operation of,

See SELECT VESTRY.

FALSE IMPRISONMENT.

1. What degree of restraint of the person will constitute an imprisonment, see 215 (a)

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See PARTNERS, 2.

FEIGNED ISSUES.

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FIERI FACIAS.

1. Where *A.* having entered into an agreement for a lease, has been let

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into possession, and has paid the stipulated rent, a tenancy from year to year is created, which the sheriff may sell under a *fi. fa.* against *A.* *Doe v. Smith*, M. 8 G. 4. page 137

2. Provided the writ issue by the name in which judgment has been obtained, the execution is regular, notwithstanding the defendant be misnamed. 298

FOREIGN ATTACHMENT.

I. Locality of cause of action.

See 306 (c)

II. Practice upon.

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See EVIDENCE, 8.

1. With respect to parochial settlement, see 470 (c)

FRAUDS, STATUTE OF.

- I. Agreement to be answerable for the debt of another.

1. What shall be a sufficient guarantee within fourth section of the statute. 201 (a)

2. What a sufficient consideration. 710

FREIGHT.

I. How constituted.

1. A sum paid by the freighter to the owner for the use of the entire ship is not properly denominated freight. *Etches v. Aldan*. 157
2. As to the mode of estimating the amount of freight as a subject-matter of insurance, see 163(a), 165(b)

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- I. What shall be contributory to,

See 165 (b), 166

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See LIEN, I.

GRANT.

I. Operation of.

1. A grant by deed of lands in the possession of a tenant from year to year *habendum* during the life of the grantor, will pass an estate of freehold without livery or attornment. *Doe v. Cole, M. 8 G. 4.* 33
2. And upon the disclaimer of the tenant for years, the grantee may enter or bring ejectment. *ibid.*

HABEAS CORPUS.

See ESCAPE, 1.

HABERE FACIAS POSSESSIONEM.

See EJECTMENT, 2—And see 221 (a)

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1. Judgment and execution against heir. 47, 48, n.

And see DEVISE.

HIGHWAY.

I. Stopping up.

See TURNPIKE ACT, 1.

1. Notice of appeal against an order for stopping up a highway must state that the appellant is a party aggrieved. *The King v. The Justices of West Riding of Yorkshire. H. 8 & 9 G. 4.* 547

II. Obstruction.

See PLEADING, 7.

III. Repairs.

See JUSTICES, 1.

2. Under the Highway Act, 13 G. 3, c. 78, s. 34, a justice of the peace cannot present a road out of repair, upon the information of any other surveyor of highways than the surveyor appointed for the particular parish, township, or place, where the road lies. *Rex v. Fylingdales, M. 8 G. 4.* 176

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1. Ambiguity of this term. 202 (a)

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I. Of person.

1. Where to be inferred from identity of name. *Roach v. Ostler, M. 8 G. 4.* 120, 123 (a)

II. Of office or benefice.

See 123 (a)

III. Of trespasses.

2. In declaration and plea 172 (b), 173 (a)

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1. Ignorance of a public statute, not allegable. 500 (f)

IMPRISONMENT.

1. What restraint shall amount to an imprisonment. 215 (b)

INCLOSURE ACTS.

I. Award of commissioners.

1. Under a power to award lands in exchange for other lands, provided such exchange he made with the consent of the respective owners, and to award lands to persons who shall agree to purchase the interest of any proprietor of lands directed to be inclosed, an award that *A.* shall receive lands from *B.* in exchange for lands of *A.* and for 2000*l.* to be paid by *A.* to *B.*, is valid. *Doe v. Preston, M. 8 G. 4.* 713
2. Such an award does not require an *ad valorem* stamp. *ibid.*

INDEMNITY.

See BOND, I. III.

726 INSOLVENT DEBTOR.

INDICTMENT.

1. *For misdemeanour.*

See Oaths, 4, 5. — Burens, 1, 8/9.

— Practice, 3. — Pleadings, 1.

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See BILL OF LADING, 1. — BILLS AND NOTES, 41.

INFANT.

I. *His privilege.*

1. Not bound by an account stated by him. 522 (a)
2. Nor by his election. *ibid.*

INFORMATION.

1. In an action for a malicious prosecution a rule absolute for a criminal information against defendant is no bar. *Caddy v. Barlow, M. 8 G. 4.* 276

INITIALS.

See SURETY, I.

INQUIRY, WRIT OF.

See 562, 562 (a)

1. Under 8 & 9 W. 3, cap. 11, s. 8. 496 (a)

INSANE PERSONS.

See COMMITMENT, 3.

INSOLVENT DEBTOR.

I. *Schedule.*

1. As to mistakes in the schedule, *see* 245 (b)

II. *Authority of assignee.*

2. Assignee of an insolvent debtor may commence an action, without first obtaining the consent of the creditors. *Allison v. Rayner, M. 8 G. 4.* 241
3. Under 1 G. 4, c. 19, s. 11, the assignee could not proceed further than an arrest on mesne process, without consent of creditors. *ibid.*
4. But under 7 G. 4, c. 37, the consent of creditors and approbation of

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a court or a commissioner are required only for the submission of disputes to arbitration and suits in equity. page 242 (a), 245 (b)

5. The want of consent cannot be set up by a debtor to the estate as a defence to an action. 243

INSPECTION OF DOCUMENTS.

See ESCAPE, 1. — PRACTICE, IV.

1. As to inspection of public records, *see* 279 (a)

INSURANCE.

I. *Interest.*

1. A. lets his ship to freight and charter to B. for a voyage, the probable duration of which is eight months, at 100*l.* per month, and by the charter-party B. is to make the advances for sailing charges, on account of the money payable for the hire of the ship, miscalled "*freight*." B. insures 300*l.* with C., for money advanced on sailing charges, and A. at the same time, insures 400*l.* with C., on freight. Upon a total loss: — Held, that C. is not entitled to consider A.'s policy as effected on gross freight, and that, the amount being 800*l.*, A. is his own insurer for a moiety of the risk. *Etches v. Aldan, M. 8 G. 4.* 157

II. *Seaworthiness.*

2. The implied warranty of seaworthiness in a policy on a ship, does not extend to her being seaworthy at every port which she leaves in the course of her voyage. *Holdsworth v. Wise, H. 8 & 9 G. 4.* 673

III. *Negligence.*

3. Negligence of the crew does not discharge the underwriter, if the loss is occasioned by one of the perils insured against. *ibid.*

IV. *Stranding.*

4. Policy on goods "warranted free from average, unless general, or the ship be stranded." On the voyage

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the ship was driven by necessity into a harbour dry every tide, where she was moored along the quay, in the place usual for ships of her burthen, and in as safe a situation as could be found; and being sharp built, she was lashed to the pier by a rope from her mast head, which the mate insisted to be sufficient; though it was objected to by the pilot who had brought the ship in. When the tide ebbed, the rope broke, and the ship fell over and bilged, and the goods in consequence were damaged. If the rope had not broken, the accident would not have happened:—Held, that the ship was stranded. *Bishop v. Pentland, M.* 8 G. 4. page 49

V. Total loss.

5. A ship deserted at sea by her crew, under a *bond fide* belief that the ship is sinking, is totally lost. *Holds-worth v. Wise, H.* 8 & 9 G. 4. 673
6. The right of the assured to recover as for a total loss, is not affected by her being afterwards restored at an expense equal to her value. *ibid.*

VI. Abandonment.

7. An abandonment is justified by the total loss for a time of the use or of the possession of the thing insured. 681

INTENT.

See *BANKRUPT*, 1, 2, 3.

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See *EVIDENCE*, 4.—*INSURANCE*, I.—*WITNESS*, 1.

I. Of money.

See *MANDAMUS*, 2.

1. The taking of any interest prohibited by 13 Eliz. c. 8. s. 5. (un-repealed,) under forfeiture of the simple interest reserved. 207 (a)
2. The payment of interest is evidence to shew that a principal sum corresponding with such payment is

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due. *Sutton v. Toomer, M.* 8 G. 4. page 125

3. As to the distinction between interest and an increase of the amount of purchase money, see *Bede v. Bidgood.* 143

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See *TRESPASS*, 4.

IRREGULARITY.

See *PRACTICE*, VII.

JEOFAILS.

1. What defects are aided after verdict, see 285

JOINDER OF COUNTS.

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JOINT STOCK COMPANY.

- I. *Liability of members to third persons.*
See *PARTNER*, 1.

1. *A.*, *B.*, and *C.*, directors of a projected joint stock company, contract in their own names with *D.*, a shareholder, for the purchase of a mine, and after the formation of the company, enter into further agreements with *D.* respecting the purchase, with a clause, exempting them from personal liability upon certain parts of the contract:—Held, that *A.*, *B.*, and *C.*, may be sued by *D.* upon those parts of the contract to which the exemption does not apply. *Attwood v. Small, M.* 8 G. 4. 246

2. As to the liability of the Patriotic Assurance Company of Ireland, see 158 (a)

II. *Liability of members inter se.*

See *ATTORNEY*, 2.

3. As to contribution, see *Milburn v. Codd, M.* 8 G. 4. 240

And see *supra*, 1.

JOINT TENANTS.

See ESTATE, V.

JUDGMENT.

I. To what period it relates.

1. Relation of judgment to first day of term in cases of bankruptcy. *Greenway v. Kisher*, M. 8 G. 4. 330

II. Proceedings upon.

See DEBT, 1.—SCIRE FACIAS, I.

III. Admissibility of, in evidence.

See EVIDENCE, 14, 15.

2. Party restrained from setting up a former judgment upon second trial. 689

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See COUNTY COURT, I.—COURT OF REQUEST, I.—JUSTICES, II.

JUSTICES.

See ALDERMAN, 2.—CERTIORARI, 1.—
COMMITMENT, 1.—HIGHWAYS, 1.
MANDAMUS, 3.—MAYOR, 1.

I. Responsibility of.

See *infra*, 6.—TRESPASS, 2.

1. No action lies against justices for a distress under a conviction for not doing statute labour on the highways, where, by reason of plaintiff's occupying land within the parish, the justices have jurisdiction. *Fawcett v. Foulis*, M. 8 G. 4. 102

II. Jurisdiction of.

See SETTLEMENT, 1.

2. In such a case a prescriptive exemption in respect of the particular estate or hamlet should be pleaded or given in evidence before the justices, or made the subject of an appeal to the quarter-sessions. *ibid.*
3. A person whose name is added to that of the regular officer in a warrant under a *fi. fa.*, by the plaintiff's attorney, and who is employed to watch the goods, after they have

been taken by the officer, is not a labourer, within the jurisdiction of justices of the peace, under 20 G. 2, c. 16. *Bramwell v. Penneck*, M. 8 G. 4. page 409

4. No presumption in favour of jurisdiction of magistrates. *Rex v. All Saints*, II. 8 & 9 G. 4. 668
5. Whether jurisdiction is sufficiently shewn if it be alleged on the face of the instrument, or whether it must be proved *abundè*, *quære*. *ibid.*
6. Where there is an entire want of jurisdiction, an action may be maintained against justices. 109

LABOURER.

1. Who, within 20 Geo. 2. c. 19. *Bramwell v. Penneck*, M. 8 G. 4. 409

2. The describing a party by the addition of "labourer" in a warrant not tantamount to an allegation of his being a labourer. *ibid.*

LACHES.

I. *Water of.*

See BILLS AND NOTES, II.

LANDLORD AND TENANT.

See AGREEMENT, 2.—LEASE, 1.

1. Tenant at liberty to dispute title of party to whom he has attorned, but from whom he did not receive possession. *Cornish v. Scarell*, 703

LEASE.

I. *What shall amount to a Lease.*

See ESTATE, 1.

II. Construction of.

1. Demise for years, at the rent of 79l. 12s. 6d., with a stipulation that lessee shall not build without a written licence. Covenant by lessor to pay all taxes, then charged or to be charged, upon or in respect of the land. Lessor having given such licence, of even date with the lease, buildings are erected, whereby the

LEASE.

value of the estate is improved, and the amount of taxes increased:—
Held, that lessor is liable for the amount of taxes, calculated upon the rent of 79*l.* 12*s.* 6*d.* only. *Watson v. Home*, M. 8 G. 4. page 191

2. Upon a demise "until Michaelmas next, and no longer," with the privilege of using part of the premises for specific purposes till Lady-day following, ejectment may be brought for those parts to which the privilege does not extend, in the interval between Michaelmas and Lady-day. *Doe v. Houghton*, M. 8 G. 4. 208

3. Such an agreement containing an express provision for giving up the farm at Michaelmas, the lessor, with the assent of the lessee, adds the words, "house and buildings."—*Samble*, that this alteration does not require a new stamp. *ibid.*

4. By a local act of parliament, and a lease made in pursuance thereof, A. grants to B. lands, with liberty to lay waggon ways for the carriage of coals, for the term of sixty years, and such further term as B., his executors, &c., shall work certain coal mines; proviso, (both in the act and the lease,) that if B. cease to work the mines, or fail in any one year to carry a certain quantity of coals to a depository called C., A. may re-enter. By a subsequent act the quantity to be carried is increased; proviso, that if B. do not yearly carry such increased quantity to C., "or to some other place near thereto, to be used as a depository for coals instead thereof," A. may re-enter. By the last proviso, the first is virtually repealed; and B. carrying the increased quantity to a depository near to C., is excused from carrying coals to C. *Doe v. Brandling*, H. 8 & 9 G. 4. 600

5. What shall be considered as net rent. 644

III. Covenants in.

6. As to what shall be considered an usual covenant, see AGREEMENT, 2, 3.

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LIBEL.

See PLEADING, 3.

LIBERUM TENEMENTUM.

1. See replication to a plea of *liberum tenementum*, when pleaded by way of assertion of title, and not as the common bar. page 221 (c)

LICENCE.

I. Operation of.

1. A licence from the vendee of a chattel to the vendor to resume the possession if the price be not duly paid, is an answer to an action of trover brought by the vendee against the vendor for resuming the possession upon non-payment of the price at the stipulated period. *Hovew v. Ball*, M. 8 G. 4. 288
2. But it is no defence in an action brought by the alienee, where the possession is resumed after the alienation. *ibid.*
3. Nor is it available against the personal representative of the vendee, where the resumption is after his death. *ibid.*

LIEN.

I. General.

1. A wharfinger has a general lien in respect of wharfage. *Holderness v. Collinson*, M. 8 G. 4. 55
2. A wharfinger has not a general lien in respect of labourage and warehouse-room, except by agreement, express or implied. *ibid.*
3. General, continued, and undisputed usage, may be evidence of such agreement. *ibid.*
4. But where the right is disputed in the place where the wharfinger lives, he cannot set it up against a customer, unless he has previously given him notice that he will deal only on those terms. *ibid.*

740 MALICIOUS PROS.

II. Particular.

See VENDOR and PURCHASER.

5. *A.* purchased and paid for East India silks, the warrants for which he sent to *B.*, his broker, with bills to nearly their value, drawn upon *B.*, which *B.* accepted. *B.* did not pay his acceptances when due, but received from *A.* the acceptances of *A.* to nearly the same amount, for the purpose of taking up his own acceptances, but which he applied to his own use, and afterwards pledged the warrants with *C.* In trover for the warrants by *A.* against *C.*:—Held, that by s. 8, of 6 G. 4, c. 94, *B.* not having paid his own acceptances, had no lien upon the warrants which he could transfer to *C.*; and that therefore *C.* had no right to detain them as against *A.* *Fletcher v. Heath*, *M.* 8 G. 4. page 335
6. As to the lien of the vendor of a chattel for the price, see *Howes v. Ball*, *M.* 8 G. 4. 288
7. As to the lien of the vendor of a chattel for repairs, 291 (a)
8. No lien where possession obtained by wrong. 292 (a)

LIVERY OF SEISIN.

See EJECTMENT, 1.

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LUCRUM EX PRÆROGATA SOLUTIONE EXACTUM.

See 151 (b)

LUNATIC.

See COMMITMENT, 1.

MALICIOUS PROSECUTION.

See EVIDENCE, 6, 7.

1. Remedies of party prosecuted.

MANOR.

1. A rule for a criminal information is no bar to an action for a malicious prosecution. *Caddy v. Barlow*, *M.* 8 G. 4. page 275

MANDAMUS.

See CORPORATION, 3.

1. In what cases granted.

1. This Court will grant a *mandamus* to a canal company, to enter upon their books the probate of the will of a deceased shareholder, leaving any question as to the validity and effect of the probate to be raised by a return to the writ. *Rex v. Worcester Canal Co.* *H.* 8 & 9 G. 4. 529
2. The Court will grant a *mandamus* to commissioners entrusted by act of parliament with the regulation of the expenditure of a parish, to compel them to levy a rate for the purpose of paying off a sum borrowed on the rates by former commissioners without pledging their personal responsibility, where the liabilities created under the former act are reserved by the new act, although the latter directs that the commissioners shall be sued in the name of their clerk, and no interest has been paid within twenty years. *Rex v. St. Paul, Shadwell*, *H.* 8 & 9 G. 4. 591
3. *Mandamus* to justices to enter continuances and hear appeal. *Rex v. Justices of West Riding of Yorkshire*, *H.* 8 & 9 G. 4. 547

MAINTENANCE.

See SETTLEMENT, 3.

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1. Relative rights of lord and tenant.

1. In respect of timber, &c. *Fleming v. Simpson*, *M.* 8 G. 4. 269

MISDEMEANOUR.

MARRIAGE.

See SETTLEMENT, 4, 5.

I. When valid.

See EVIDENCE, 2, 3.

MARSHAL.

See ESCAPE, 1.

MASTER AND SERVANT.

1. The master *de facto* of a married woman may maintain actions founded upon that relation against a wrongdoer, though the contract may not be binding as against the husband. *Harper v. Luffkin*, M. 8 G. 4. page 166

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1. Not necessarily a justice. 369

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MIDDLESEX COURT OF REQUESTS.

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MISDEMEANOUR.

I. Costs:

1. Where allowed to prosecutors of misdemeanours. *Res v. Cooke*, H. 8 & 9 G. 4. 526

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II. Recognizance.

1. Recognizance by prosecutor of indictment for misdemeanour under 5 W. & M. c. 11, s. 2. page 526

MISNOMER.

See EXECUTION, 1.—SHERIFF, 1, 2, 3.

MISTAKES.

1. In an attorney's bill, see 245 (b)
2. In an insolvent's schedule, see *ibid*.

MUTINY ACT.

1. Examination of soldier as to settlement under 22 Geo. 3, c. 4. 667
2. Under 5 Geo. 4, c. 13. *ibid*.
3. Power of magistrates under Mutiny Act is magisterial and not ministerial. 666

NEGLIGENCE.

See ATTORNEY, 1, 11.—INSURANCE, 2, 6.—TURNPIKE ROADS, 5.

NEW TRIAL.

I. When grantable.

See PRACTICE, 2, 7.

1. A new trial will not be granted, in an action for a malicious prosecution, on the ground of excessive damages. *Caddy v. Barlow*, M. 8 G. 4. 275
2. Nor to enable a party to produce evidence with which he might have been provided at first trial. *Doe v. Price*, H. 8 & 9 G. 4. 683

II. Affidavits.

3. Where a rule *nisi* for a new trial is obtained without affidavit, no affidavit can be read in answer.

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742. OVERSEERS.

NIL DEBET.

See ABATEMENT, 2.

NONSUIT.

1. Not grantable in bank, where no leave reserved at nisi prius. page 261

NOTICE OF APPEAL.

See APPEAL, 2.

NULLA BONA.

See SHERIFF, 1.

NURTURE.

See PAUPER, 2.

OBLIGATION.

See BOND—HONORARY OBLIGATION.

OMNIA PRÆSUMUNTUR RITE ESSE ACTA.

1. This maxim does not apply to facts which constitute jurisdiction of magistrates. 668
2. Of commissioners of bankrupt. *ibid.*

ONUS PROBANDI.

See EVIDENCE, 1.

OPPRESSION.

See STAY OF PROCEEDINGS, 1.

ORDERS OF JUSTICES.

A. Jurisdiction not presumed in. 669

OSTLER.

See SETTLEMENT, 7, 11.

OTHER ACTION PENDING.

See ABATEMENT, 1.—STAY OF PROCEEDINGS, 2.

OVERSEERS.

See CERTIFICATE, 2.—SELECT VESTRY.

PARTNERS.

I. Duty of overseers.

1. The refusal by an overseer to allow a parishioner an inspection of a poor rate, constitutes the latter a party aggrieved, and the former a defaulter, within 17 Geo. 2, c. 3, s. 3. *Bennett v. Edwards*, M. 8 G. 4. page 482
2. Whether an *assistant overseer* is a person within that statute, *quære. ibid.*
3. In an action upon that statute, it must be proved that, under his appointment by the select vestry, it is the duty of the overseer to produce the rate. *ibid.*

OYER.

See VARIANCE, 1.

PARENT AND CHILD.

See PAUPER, 1, 2.—SETTLEMENT, 8.

PARTNERS.

See ATTORNEY, 2.—JOINT STOCK COMPANY, 1, 2.—TREASURY, 4.

I. Liability of, to third persons.

1. A. pays money for shares in a mine to B., describes himself as treasurer of the mine, and receives from persons calling themselves directors, a memorandum purporting that A. is a proprietor of shares, and that his name is entered in the cost book. A. in writing, and in conversation, acknowledges himself to be a shareholder, and receives money from B. as treasurer, on account of supposed profits, but no deed is executed, nor is there any assignment of any interest in the mine from the lessee:—Held, that A. is not liable for supplies furnished the mine, unless furnished on his credit. *Vice v. Lady Anson*, M. 8 G. 4. 113
2. A joint interest in and occupation of a farm by two persons, is not a

PAYMENT.

partnership, so as to convey to each an implied authority to bind the other by the acceptance of bills of exchange for disbursements in respect of the farm. *Grenada v. Dower*, H. 8 & 9 G. 4. page 640

PARTY AGGRIEVED.

1. Costs to prosecutor of an indictment for obstructing a highway where party aggrieved. 527, 528
2. Where necessary to shew in notice of appeal that appellant is a party aggrieved. 547

PARTY WALL.

See BOUNDARY, 4.

PAUPER.

See CERTIFICATE, 2.—EVIDENCE, 8, 9, 11.—RATES, 1.—RELIEF.—SETTLEMENT.

I. Family of Irishman.

1. The wife and children of an Irishman, who has no settlement in England, and absconds, leaving them chargeable, must be removed to the place of the wife's last legal settlement, and cannot be passed to Ireland, under the 59 Geo. 3, c. 12, s. 33. *Rex v. Cottingham*, M. 8 G. 4. 439

II. Within age of nurture.

2. The sessions quashed an order of removal both as to a married woman and a child who accompanied her:—Held, that they thereby virtually declared the child to be within the age of nurture, and irremovable from the mother, and that the Court might presume the fact to be so. *Rex v. Brington*, M. 8 G. 4. 481

PAYMENT.

I. Presumption of.

See BILLS AND NOTES, 2, 3, 4.

PLEADING.

743

1. Mere lapse of time will *prima facie* support a plea of payment. page 596
2. So it will justify a return of payment to a mandamus. *ibid.*

II. Application of.

See *Biggs v. Dwight*, M. 8 G. 4.

308, 841 (a)

PEERS.

See ARREST, 1.—ATTORNEY, 12.—PRACTICE, 3, 4, 5.

PERFORMANCE.

See PLEADING, 7.

PER QUOD SERVITIUM AMISIT.

See TREASURE, 1.

PLEADING.

See COSTS, 7.—EVIDENCE, 4, 10.—PROTESTATION, 1.—VARIANCE, 1.

I. Declaration.

See ARBITRAMENT, 1.

1. A count in assumpsit for money had and received by defendant, as executor, to the use of plaintiff, cannot be joined with a count for money due to plaintiff for defendant, as executor, upon an account stated with him of money due from him, as executor. *Ashby v. Ashby*, M. 8 G. 4. 180
2. *Quære*, whether the latter count can be joined with a count for money paid by plaintiff to the use of defendant, as executor. *ibid.*
3. A declaration stating, that defendant "published a false, scandalous, malicious, and defamatory libel of and concerning plaintiff, containing among other things the false, scandalous, malicious, defamatory, and libellous matter following, that is

to say, "is bad, for not averring that *such libellous matter* was "of and concerning the plaintiff;" unless the words set out distinctly point to the plaintiff, or that application is given to them by an immundo. *Clement v. Fisher*, M. 8 G. 4.

page 281

4. A declaration omitting to allege a fact, without proof of which at the trial the judge ought not to have directed, or the jury to have found a verdict for the plaintiff, cured by such verdict. 285

5. *A.* having, at my request, consented to stay proceedings against *B.*, I, *C.*, do hereby, in consideration thereof, promise to pay 50*l.* on account on the first day of April next, and the further sum of 53*l.* within four months next ensuing the first day of April." A declaration on this agreement, stating, that in consideration that *A.*, at the request of *C.*, would consent to suspend proceedings against *B.*, *C.* promised to pay to *A.* 30*l.*, and that *A.* did suspend proceedings against *B.*, discloses a sufficient consideration, avers a sufficient performance, and is supported by the terms of the agreement. *Payne v. Wilson*, M. 8 G. 4. 708

6. Inspection of papers granted for the purpose of framing declaration. 571

II. Indictment.

7. Indictment for obstructing a highway, charging, "that defendant removed a culvert in the parish of *S.*, opposite to a mill there, in a highway there, leading from *S.* to *H.*:"—Held, good on motion in arrest of judgment. *Rex v. Knight*, M. 8 G. 4. 217

III. Plea.

See ABATEMENT, 1.—ARBITRAMENT, 2, 3.—DEBT 1.—JUSTICES, 1.—PAYMENT, 1.—STAY OF PROCEEDINGS, 1.

8. In a plea justifying a trespass under the warrant of a magistrate, all the facts constituting the jurisdiction must be alleged, and are issuable. page 668

IV. Replication, &c.

9. To debt on bond conditioned "to replace stock, with all dividends which shall accrue due upon the same, from the date of the bond, upon three months' notice," defendant pleaded that plaintiff did not give three months' notice to replace the stock, with the dividends which would have become due for the same from the date of the bond. Replication alleged, that more than three months before action, plaintiff gave notice, at the expiration of three months to replace the stock, with all dividends which had accrued due on the same from the date of the bond, and then went on to assign a breach in the non-transfer of the stock:—Held, that the notice set out in the replication was sufficient; and that the assignment of the breach was unnecessary and informal, but that the objection could be taken only by way of special demurrer, for duplicity. *Hudson v. Smith*, M. 8 G. 4. 489

10. If a plea to a declaration on an indemnity or surety bond, states, that the principal duly accounted, and the replication alleges the receipt of several sums for which he did not account, and the rejoinder states that these sums were received from *C. D.* and *E.* and that *A.* did not account, a sur-rejoinder, alleging that the moneys stated in the replication are other and different from those specified in the rejoinder, and concluding to the country,—is good. *Calvert v. Gordon*, M. 8 G. 4. 497

11. Where to a *quo warranto* information defendant pleaded that he was elected by the major part of the common council duly assembled, a replication stating that notice of the

POWER OF ATTORNEY.

purpose for which the assent was to be held had not been given, was held bad on demurrer.—*Re v. Okebynd*, H. 8 & 9 G. 4. page 534

V. Assignment of breaches.

See PRACTICE, 7.—*Supra*, 9.

VI. Profert.

12. Party pleading a grant of a next presentation and a presentation under it, as the foundation of a title in *quare impedit*, need not bring the deed of grant into Court.

298 (b)

POOR RATES.

See RATES, 1.—SETTLEMENT, 9.

POWER OF ATTORNEY.

I. Construction of.

1. To be construed strictly. 79, 708
2. A power of attorney "for me, and on my behalf, to pay and accept such bills of exchange as shall be drawn or charged on me, by my agents or correspondents, as occasion shall require;" authorizes the attorney to accept such bills only as are drawn upon the principal by his agents or correspondents in that character, and in respect of the private transactions, and on the individual accounts, of the principal. *Attwood v. Munnings*, M. 8 G. 4.

66

3. A power of attorney, to pay and receive money, buy and sell lands, bring and defend actions, give and take releases, indorse and negotiate bills of exchange payable to the principal, and generally to perform all other affairs and concerns of the principal, does not authorize the attorney to accept bills drawn on the principal. *ibid.*

PRACTICE. 745

PRACTICE.

See AFFIDAVIT.—BAIL, 1.—COSTS, 1. 3.—EVIDENCE, 12, 13.—NEW TRIAL, 1.—PRESENTMENT, 1.—PROCEDENDO, 1.—PROTESTATION, 1.—USURY, 2.—VENUE, 1.—STAY OF PROCEEDINGS, 1.

I. Process.

1. Where a *Bill of Middlesex* issues, upon an affidavit of debt duly sworn, pursuant to the 12 G. 1, c. 29, s. 2, an office copy of the same affidavit will authorize the issuing of a *latitat* into a different county. *Baker v. Allan*, M. 8 G. 4. page 232
2. A term must not intervene between the return of an *alias*, and the issuing of a *pluries*, bill of Middlesex. *Willen v. Archer*, M. 8 G. 4. 317
3. An Irish peer not liable to be sued by *capias ad respondendum*. *Coates v. Lord Hawarden*, M. 8 G. 4. 110
4. Although the *capias* be serviceable or formal only. 113, n.
5. Upon a plea of peerage in abatement the Court will not postpone the trial at the instance of the defendant. *Wade v. Birmingham*, H. 60 G. 3. & 1 G. 4. 111, n.

II. Particulars of demand.

7. As to mistakes in particulars of demand, see 245 (b)

III. Payment of money into court.

See 159 (a)

IV. Notice to produce.

And see ESCAPE, 1.—INSPECTION OF PUBLIC DOCUMENTS, 1.

8. Where a party to an action is resident abroad, all papers having a direct bearing on the cause will be presumed to be put into the hands of his attorney, and a reasonable notice to that attorney will be sufficient. 114 (b)

9. *Secus*, with regard to a party residing in this country, *semble*. page 114 (b)
10. Although the party be actually travelling in Scotland, *semble*. *ibid*.
11. As to what papers may be naturally supposed to be placed in the hands of the attorney, see 115 (b)

V. Trial.

12. Where upon the plaintiff's evidence, the judge intimates a strong opinion in favour of the defendant, upon a point decisive of the cause, and in consequence of such intimation, the defendant's counsel omits to call evidence in support of a different point intended to be raised by way of defence, the Court will direct a new trial only, and will not order a verdict to be entered for the plaintiff. *Le Fleming v. Simpson*, M. 8 G. 4. 269
13. Upon a covenant to use on demised premises all dung, straw, soil, compost, ashes and manure made thereon, a breach is assigned in not using on demised premises all dung, straw, soil, compost, ashes and manure made thereon, but on the contrary thereof, taking away straw, soil, ashes and manure. Plea, that defendant did not take away the said straw, compost, ashes and manure. A verdict being found for the plaintiff upon the supposed insufficiency of the plea, without the production of evidence, the Court refused to enter a nonsuit, or direct a new trial. The proper course seems to be, to enter a verdict for the defendant upon the breach, with an assessment of damages as to the soil, or generally as to the premises in the breach not covered by the plea. *Marrack v. Ellis*, M. 8 G. 4. 511

VI. Proceedings against sheriff.

14. After a rule to bring in the body, defendant has the same time to

PRESENTMENT.

- justify bail, as the sheriff to bring in the body, viz. four days in town, and six in country causes. *Whittle v. Oldaker*, M. 8 G. 4. page 298
15. A rule to bring in the body does not bind plaintiff to proceed by attachment; at the expiration of that rule, he may sue upon the bail bond. *ibid*.

VII. Irregularity.

16. Where the service of a writ is irregular, but the defendant, on receiving notice of declaration, says, "It is all right, I will call and settle the debt and costs;" the irregularity is waived. *Lloyd v. Hawkyard*, M. 8 G. 4. 320

PRÆROGATA SOLUTIO.

1. A debtor is not guilty of legal usury in exacting an exorbitant sum as a consideration for the payment of the debt before the time at which it is demandable. 151 (b)

PREAMBLE.

See STATUTES, 1.

PRESCRIPTION.

1. How pleaded.

See

286, n.

PRESENTATION.

See DEEDS, 2.—QUARE IMPEDIT, 2.

PRESENTMENT.

See BILLS AND NOTES, 3, 4.—HIGHWAYS, 1.

1. Of offences.

1. The presentment by a constable of any offence, whether at the assizes or quarter sessions, must be made upon oath, before the grand jury. *Rex v. Justices of Somersetshire*, M. 8 G. 4. 272

PROMISSORY NOTE.

PRESUMPTION.

See EVIDENCE, 3.—INTEREST, 2.—
PAYMENT, 1.—SETTLEMENT, 9.

PRINCIPAL AND AGENT.

See AUCTIONEER, 1.—LIEN, 3.—
POWER OF ATTORNEY.

PRINCIPAL AND FACTOR.

See LIEN, 3.

PRISONER.

See ESCAPE, 1.

PRIVILEGE FROM ARREST.

See ARREST, 1.

PROBATE.

See MANDAMUS, 1.

PROCEDENDO.

1. Where one of two defendants removes a cause from the Lord Mayor's Court, a procedendo will be awarded, unless bail be put in for both. *Keate v. Goldstein, M. 8 G. 4.* 305

PROCESS.

See PRACTICE, I.—WRITS.

PROFERT IN CURIAM.

See PLEADING, VI.

PROHIBITION.

1. To the County Court where it has no jurisdiction. 823, n.

PROMISSORY NOTE.

See BILLS AND NOTES.

RATES. 747

PROTESTATION.

Nature and effect of, see page 500 (a)

PUBLIC HOUSE.

See AGREEMENT, pl. 2, 3.

QUARE CLAUSUM FREGIT.

See TRESPASS, III.

QUARE IMPEDIT.

1. *Seisin under which plaintiff claims, how alleged.*
1. A *commendam retinere* insufficient to found a title in the crown 287 (a)
2. A presentation by the crown must be alleged in a declaration at the suit of the king, *ibid.*
3. But the omission is cured by a verdict finding the king's seisin. *ibid.*
4. Instance of a recovery, by virtue of such finding, contrary to the real facts of the case. *ibid.*

QUO WARRANTO.

I. *In what cases.*

See CHARTER.—CORPORATION.

1. As to the circumstances under which the crown may dissolve a charter by *quo warranto*, see 635

II. *Who may be a relator.*

See PLEADING, 8.

2. Any burgess is a competent relator in *quo warranto* against a party exercising the office of town-clerk, though the right of electing to that office be in a select body. *Rez v. Davies, H. 8 & 9 G. 4.* 538

RATES.

See AGREEMENT, 3.—MANDAMUS, 2.
SETTLEMENT, V.—WITNESS.

748 RELATIONS.

I. *How assessed.*

1. Where a canal passes through several parishes, and the tonnage dues earned in each vary in amount, the proprietors of the canal must be rated to the poor of each parish in proportion to the amount of tonnage dues actually earned there, and not according to the proportion of the whole amount earned along the whole line of the canal.
Rex v. Kingsnithford, M. 8 G. 4.

page 20

II. *By whom paid.*

See LEASE, 1.—SETTLEMENT.

III. *Inspection of.*

See OVERSEERS, 1, 2.

RECEIPT.

See STAMP, 3.

RECOGNIZANCE.

See MISDEMEANOUR, II.

RECORDS.

I. *Action upon.*

See DEBT, I.

II. *Inspection of.*

See 276

RE-ELECTION.

See CORPORATION, V.

RE-ENTRY.

See CONDITION, 1.—LEASE, 4.

REGISTER.

See CERTIFICATE.

RELATION.

I. *Of entry.*

See ENTRY, 3.

II. *Of judgment.*

See JUDGMENT, 1.

RELATIONS.

See COSTS, 3.

SCIRE FACIAS.

RELATOR.

See CORPORATION, III.—QUO WARRANTO, 2.

RELIEF.

1. *Samble*, that relief given to a pauper within the relieving parish is no evidence of his being settled there.
Rex v. Tronbridge, M. 8 G. 4. 7

REMITTER.

See TRESPASS, 4.

RENT.

See AGREEMENT, 3.—DISTRESS, I.—ESTATE, 3.—SETTLEMENT, 15.

RES INTER ALIOS ACTA.

See 173 (a), EVIDENCE, 13.

RESIANCY.

See COSTS, 7.

RESTITUTION.

I. *Upon reversal of judgment.*

See 175

ROGUES AND VAGABONDS.

See 666

RULE.

See INFORMATION, 1.—PRACTICE, 14, 15.

SAILING CHARGES.

See INSURANCE, 1.

SANDHURST COLLEGE.

See SETTLEMENT, 9.

SCHEDULE.

See INSOLVENT DEBTOR, 1.

SCIRE FACIAS.

I. *Upon judgment.*

1. To assign breaches under 8 & 9 W. 3, c. 11, *see* 490 (a), 492 (a)

SELECT VESTRY.

SCOTLAND.

See PRACTICE, 10.

SEAMEN'S WAGES.

1. Not directly liable to contribute to general average. page 165 (b)
2. How indirectly contributory, 166, n.

SEAWORTHINESS.

See INSURANCE, II.

SECONDARY EVIDENCE.

See EVIDENCE, 9. 10. 12.

SEDUCTION.

See TRESPASS, I.

SEISIN.

See DISSEISIN.—EJECTMENT, I.

I. Of advowson, how alleged.

See QUARE IMPEDIT, I.

SELECT VESTRY.

See OVERSEERS, 3.

I. By custom.

1. A select vestry, consisting of an indefinite number, may legally exist by custom. *Golding v. Penn*, H. 8 & 9 G. 4. 647
2. Such custom, though it may, perhaps, imply that there must always be a reasonable number with reference to the circumstances of the parish, is not abrogated by the acceptance of, and long acquiescence in, a faculty, by which the Ordinary grants and confirms a select vestry, fixes the number at forty-nine, and appoints certain individuals, among whom are some of the former vestry, to be vestrymen. *ibid.*

II. By faculty.

3. The ordinary has no power to create a select vestry. *ibid.*

SETTLEMENT. 749

SEQUESTRATION.

1. Sequestrators take no estate. 707
2. Cannot accept a surrender. *ibid.*

SESSIONS.

See JUSTICES, I.—PAUPER, I.

SETTLEMENT.

I. By apprenticeship.

See EVIDENCE, 8.

1. Where an apprentice is bound out of a parish by his father, but part of the expense is paid out of the parochial funds, the indenture must be approved by two justices, "under their hands and seals," pursuant to 56 G. 3, c. 139, s. 11; or it will be void *ab initio*. *Rex v. Stoke Damarel*, M. 8 G. 4. 458

II. By birth.

See PAUPER, I.—RELIEF.

2. The fact of a poor child's being first found in a particular parish, is no evidence of his having been born there. *Rex v. Trowbridge*, M. 8 G. 4. 7
3. And his being maintained by that parish for several years, and afterwards occasionally relieved by them, does not amount to an admission of his being settled there. *ibid.*

III. By estate.

4. The interest of a tenant from year to year, or of the executrix of such tenant, of an estate under 10l. a-year, passes to her husband on their marriage by operation of law, and he acquires a settlement by forty days' residence thereon. *Rex v. Ynyscynhaiarn*, M. 8 G. 4. 16
5. The wife of a person who was legally settled in A., but was a transported convict, went to B., and resided there upon an estate

in which she was jointly interested with her sisters, under their mother's marriage settlement:—Held, that she was residing upon *her own*, and irremovable. *Rex v. Brighton, M. 8 G. 4.* page 431

6. The expenses of the surrender of a copyhold estate, paid by the purchaser to his attorney, are not part of the consideration, so as to bring the purchase within the 9 G. 1, c. 7, s. 5, and entitle the purchaser to a settlement. *Rex v. Cottingham, M. 8 G. 4.* 469

IV. By hiring and service.

See EVIDENCE, 11.

7. *A.* asked *B.* an innkeeper for a place. *B.* put *A.* on as ostler, saying, that he did not mean him to have a settlement. No earnest or wages were given, but *A.* was to have what he got as ostler. *A.* lodged and boarded in *B.*'s house. *A.* could have quitted at any time he pleased, or *B.* might have turned him away at any time. *A.* served under the above terms more than a year:—Held, that this was not a general or yearly hiring, and that no settlement was gained by it. *Rex v. Great Bowden, M. 8 G. 4.* 13

8. A pauper, under age, hired himself by contract to serve on board a ship trading to Newfoundland. While he was so serving and before he attained twenty-one his father acquired a new settlement. The pauper, after he had attained twenty-one, returned to his father's house:—Held, that the pauper was not emancipated when his father acquired the new settlement, and that his settlement shifted with that of his father. *Rex v. Lytchett Matavers, M. 8 G. 4.* 25

9. The pauper was hired by one of the superintendents of the Royal Military College at Sandhurst, at 16s. a-week, and two suits of

clothes per annum; to give a month's notice if he wished to leave, but to be dismissed (for misconduct) at any time. The college is exempt from poor rates, and pays no taxes for its servants. The pauper remained a year in the service, boarding and lodging in the college:—Held, that he acquired a settlement in Sandhurst. *Rex v. Sandhurst, M. 8 G. 4.* 95
Vide infra, 13, 15.

10. A contract of hiring and service for a year, made on a *Sunday*, is not within the prohibition in 29 Car. 2, c. 7, s. 1; and due service under it confers a settlement. *Rex v. Whitnash, M. 8 G. 4.* 452

11. *A.* agrees with *B.* to serve him as ostler at 2s. a week in the summer, and 1s. 6d. a week in the winter:—Held, a weekly hiring. *Rex v. Rolenden, H. 8 & 9 G. 4.* 689

12. Under a general hiring the servant is bound to serve and the master to employ for a year. 16

13. A hiring for as long as the servant pleases is a hiring at will, and rebuts the presumption of a hiring for a year. *ibid.*

Vide supra, 9:—*Infra*, 15.

V. By payment of rates.

Vide supra, 9.

14. A residence of forty days, previous to the passing of 6 Geo. 4, c. 57, upon a tenement of 10l. a year, by a party who has paid parochial rates, will not confer a settlement, unless all the forty days are subsequent to such payment. *Rex v. Ringstead, M. 8 G. 4.* 448

VI. By renting a tenement.

15. The taking of a tenement at twenty guineas a year, the rent to be paid weekly, but either party to be at liberty to give three months' notice from any quarter-day, is a yearly hiring within 6 G. 4, c. 57. *Rex v. Herstonceux, M. 8 G. 4.* 426
Vide supra, 9, 13.

SOLDIER.

16. Under 6 G. 4, c. 57, the *bona fides* of the renting relates only to the contract as between landlord and tenant. *Rex v. Kibworth Harcourt*, H. 8 & 9 G. 4. page 691
17. The whole rent need not be paid by the renter, provided it be actually paid. *ibid.*

SEWERS RATES.

See AGREEMENT, 2.

SHERIFF.

- See JUSTICES, II.—LANDLORD AND TENANT, I.—PRACTICE, 18, 14.
1. A., by signing his initials, executes a warrant of attorney, wherein he is misnamed. Judgment is signed, and a *f. fa.* issues in the wrong name. The sheriff seizes, but afterwards abandons the possession in consequence of the plaintiff's refusing to indemnify him against a claim of property set up by a stranger. The sheriff cannot return *nulla bona*. *Reeves v. Slater*, M. 8 G. 4. 265
2. No action would lie at the suit of A. against the sheriff for such seizure. 267, 268
3. Sheriff bound to ascertain whether the person whose body or goods he takes is the party against whom judgment was given. 268

SHIP.

See INSURANCE, 1, 2.—STRANDING, 1.

1. In trover for a ship with "the apparel and appurtenances thereto belonging," the plaintiff cannot set up a distinct title to a new boat and cordage. *Shannon v. Owen*, M. 8 G. 4. 392

SOLDIER.

See EVIDENCE, 12.—MUTINY ACT, 1.

STAMP. 751

SOUTHWARK COURT OF REQUESTS.

See page 563

SPRINGING CONSIDERATION.

See 710 (a)

STAGE COACH.

1. Stage coach proprietors not within 3 Car. 1, c. 1, or 29 Car. 2, c. 7. *Sandeman v. Bridge*, T. 8 G. 4. 457 (a)
2. An action will therefore lie for neglecting to convey a passenger on a Sunday. *ibid.*

STAMP.

I. *Ad valorem*.

See ARBITRAMENT, 1.

II. *Agreement*.

1. Where an agreement duly stamped contains a special clause for referring disputes to arbitration, and in a second agreement between the said parties, it is stipulated that disputes as to the construction of the second agreement shall be decided by arbitration, according to the provision of the first agreement, a stamp adapted to the number of words actually written in the second agreement, without counting the clause referred to, is sufficient. *Atwood v. Small*, M. 8 G. 4. 246
2. "I have in my hands three bills which amount to 120*l.*, which I have to get discounted, or return on demand," requires no stamp. *Mullett v. Hutchison*, H. 8 & 9 G. 4. 522
3. Nor an acknowledgement by an attorney of the receipt of deeds. 526
4. Nor an I O U. 706

III. *Bills and Notes*.

5. Where money is advanced upon a note purporting to bear interest at

three per cent., and by the assent of maker and payee "three" is struck out, and "two and a half" substituted, the note may be looked at to ascertain the terms on which the money was advanced. *Sutton v. Toomer*, M. 8 G. 4. page 125

IV. *Conveyance.*

See ATTORNEY, 9, 10.

6. An award by commissioners of inclosure, that A. shall receive from B. land and 2000*l.* in exchange for the land of A., does not require an *ad valorem* stamp. *Doe d. Lord Suffolk v. Preston*, M. 8 G. 4. 707

V. *Deeds.*

7. A bond conditioned for the payment of money and interest, and also for the performance of collateral acts, requires only the *ad valorem* stamp appropriated to the principal sum, where that stamp exceeds 35*s.*, which the collateral matter would require if it stood alone. *Dearden v. Binns*, M. 8 G. 4. 130

VI. *Lease.*

See LEASES, 3.

VII. *Receipts.*

Vide supra, 3.

8. A receipt stamp necessary only where a subsisting debt is discharged 706

VIII. *Unstamped documents where admissible for collateral purposes.*

See 705, 706

STATUTE LABOUR.

See JUSTICES, 1.

STATUTES.

I. *How construed.*

1. In construing local acts, the Court will not look at the preamble, or at the words of a particular clause alone, but will form its judgment upon a view of the whole act. 605

STATUTES.

II. *Particular statutes cited or commented upon.*

Henry 8.

37, c. 9. Usury. page 207 (a)

Edward 6.

5 & 6, c. 20. Usury. *ibid.*

Elizabeth.

5, c. 4. Wages of labourers. 418
— s. 26. Parish apprentices. 465

13, c. 8. Usury. 207 (a)

43, c. 2. Parish apprentices. 460

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2. Notwithstanding the exception, trustees may stop up and discontinue, and give up to the owners of the adjoining lands, an old road, leading to a church, to which the new road does not immediately lead. *ibid.*

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